TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 283.

THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOR THE THIRD JUDICIAL DISTRICT, AND FOR THE COUNTY OF GREENE, AND THE COUNTY CLERK OF SAID COUNTY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, EX REL., ROBERT MURRAY AND WILLIAM BUCKLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 19, 1866.

SUPREME COURT OF THE UNITED STATES.

No. 203.

THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOR THE THIRD JUDICIAL DISTRICT, AND FOR THE COUNTY OF GREENE, AND THE COUNTY CLERK OF SAID COUNTY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, EX REL., ROBERT MURRAY AND WILLIAM BUCKLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	2
Alternative writ of mandamus	3	2
Answer to writ	9	4
Demurrer	18	7
Judgment prayed	20	9
Continuance	20	9
Judgment	21	9
Bond	23	10
Citation	25	11
Assignment of errors	27	12
Joinder in error	29	13

1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said circuit court of the United States, for the southern district of New York, before you, between the United States, on the relation of Robert Murray and William Buckley, and the *the* justices of the supreme court of the State of New York, for the third judicial district, and for the county of Greene, and the county clerk of said county, a manifest error hath happened to the great damage of the said justices of the said supreme court and county clerk aforesaid, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

2 Witness, the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the United States the ninety-first.

KENNETH G. WHITE,
Clerk.

AMASA J. PARKER, *Attorney*,
No. 55 State street, Albany, N. Y.

U. S. Circuit Court, southern district of New York.

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States, for the southern district of New York, 2d circuit, do hereby certify that the following pages, numbered from 1 to 28, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of the justices of the supreme court of the State of New York, for the 3d judicial district, &c., *vs.* United States ex rel., Robert Murray and al., as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district

of New York, in the 2d circuit, this 15th day of December, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the said United States the ninety-first.

[SEAL.] KENNETH G. WHITE,
Clerk.

[5-ct. int. rev. stamp, cancelled.]

In the Supreme Court of the United States.

THE JUSTICES OF THE SUPREME COURT of the State of New York, for the third judicial district and for the county of Greene, and the county clerk of said county, plaintiffs in error,
vs.
THE UNITED STATES, EX REL., Robert Murray and William Buckley, defendants in error.
} Writ of error.

AMASA J. PARKER, *Att'y,*
No. 55 State street, Albany, N. Y.

I allow the within writ of error this 23d day of November, 1866.
S. NELSON.

Filed Nov. 24, 1866.

3 Pleas before the justices of the circuit court of the United States for the southern district of New York, at the court rooms of the said court, at the city of New York, of the October term, in the year one thousand eight hundred and sixty-six.

Witness, Samuel Nelson, esq., associate justice of the Supreme Court of the United States.

KENNETH G. WHITE,
Clerk.

UNITED STATES, *ss:*

The President of the United States of America sent to the justices of the supreme court of the State of New York for the third judicial district, and for the county of Greene, and to the clerk of the county of Greene, and of the supreme court therein, his writs close in these words, to wit:

The President of the United States of America to the justices of the supreme court of the State of New York, for the third judicial district, and for the county of Greene, and to the clerk of the county of Greene, and of the supreme court therein, greeting:

Whereas, it has lately been represented to the circuit
4 court of the United States for the southern district of New York, before the judges thereof, on the part and behalf of Robert Murray and William Buckley, that at a circuit court and ssecial term of the supreme court of the State of New York, held in

and for the third judicial district, and county of Greene, at Catskill, in said county, on the 8th day of June, 1864, in a certain suit then and there pending in the said supreme court, before you, or one of you, the said justices, whereof Albert W. Patrie was plaintiff, and Robert Murray and William Buckley were defendants, a judgment was entered and docketed in the office of the clerk of the said court, and of the said county of Greene, in favor of the said Patrie, against the said Murray and Buckley, for the sum of nine thousand three hundred and forty-three dollars and thirty-four cents, damages, and costs:

And whereas, it has also been represented to the said circuit court, that after the entry of the said judgment, a writ of error to the said supreme court in and for the said county of Greene, was duly allowed by the said circuit court, upon the said judgment, and a cita-
5 tion thereon was also allowed by a judge of the said circuit court, and a proper bond given thereon for the removal of the said action into the said circuit court of the United States, for the southern district of New York, to the end that the said circuit court might thereupon proceed to try and determine the facts and the laws in such action in the same manner as if the same had been originally commenced in said circuit court, the judgment in said action in said supreme court, notwithstanding, and which said writ of error, citation, and bond were duly filed and served:

And whereas, it has been represented to the said circuit court, that after the rendition of the said judgment, a motion was made on behalf of the said Murray and Buckley before you, the said justices, or some one of you, to allow the said action to be removed and transferred into the said circuit court of the United States, and for a stay of proceedings in said action, and that said motion was denied by you, the said justices, or by some one of you, and that you, or some one of you, have proceeded further in the case and have permitted execution to be issued on said judgment:

6 Whereupon, the said circuit court being willing that justice should be done in the premises, you are hereby commanded that you make due and legal return to said writ, as required by law, and that you do allow the said action to be removed and transferred into the said circuit court of the United States for the southern district of New York, and that you do proceed no further in said case, or, in default thereof that you and each of you make known to the circuit court of the United States for the southern district of New York, before the judges thereof, at the court room of the said court, at the city of New York, on the twenty-second day of October, inst., why you and each of you have not done the same, and have you then and there this writ.

Witness the honorable Samuel P. Chase, Chief Justice of the Supreme Court of the United States, at the court room of the said circuit court, in the city of New York, the sixteenth day of October, in the year of our Lord one thousand eight hundred and sixty-

7 six, and of the independence of the United States the ninetieth.

[L. S.] KENNETH G. WHITE,
Clerk.

BLACHFORD, SEWARD & GRISWOLD.
Attorneys for relators,
No. 29 Nassau street, New York.

The foregoing writ is hereby allowed by the circuit court of the United States for the southern district of New York, this sixteenth day of October, 1866.

S. NELSON.

And which said writ was issued and allowed upon appropriate affidavits and schedules, presented on the part of the relators, and verifying the facts in said writ stated.

9 The answer of the justices of the supreme court of the State of New York for the third judicial district, and for the county of Greene, and of the clerk of the county of Greene, and of the supreme court therein.

The return and answer of the justices of the supreme court of the State of New York for the third judicial district, and for the county of Greene, and of the clerk of the county of Greene, and of the supreme court therein, to the alternative writ of mandamus issued on the application of Robert Murray and William Buckley as within mentioned.

The within named, to whom the within writ of mandamus is directed, return the same to the circuit court of the United States for the southern district of New York, and by way of showing cause why a peremptory mandamus should not issue, answer, the allegations of said writ as follows:

That the suit mentioned in the said alternative writ of mandamus commenced in the supreme court by personal service of process in favor of Albert W. Patrie against Robert Murray and William

10 Buckley, on the fifteenth day of January, 1863, and the venue was laid in the county of Greene.

That the summons and complaint and answer in said action was as follows:

Supreme court, county of Greene.

ALBERT W. PATRIE, plaintiff, *against* ROBERT MURRAY and WILLIAM BUCKley, defendant.	Summons for relief.

To the above named defendants:

You are hereby summoned to answer the complaint in this action, which will be filed with the clerk of the county of Greene, and to serve a copy of your answer on us at our office in Catskill, Greene county, N. Y., within twenty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to

answer said complaint as hereby required the plaintiff will apply to the court for the relief demanded in the complaint.

WATSON & GRISWOLD,
Plaintiff's Attorneys.

Dated January 15th, 1863.

11 Supreme court, Greene county.

ALBERT W. PATRIE, plaintiff,
against
ROBERT MURRAY and WILLIAM BUCKley, defendants.

The above-named plaintiff, Albert W. Patrie, complains of the above-named defendants, Robert Murray and William Buckley, and shows to this court that on the 27th day of August, 1862, at the town of Cairo, in said county of Greene, the said defendants assaulted the said plaintiff, and with force and arms, compelled him to go from his residence in said town, to the village of Catskill, in said county, and from thence to the city of New York, and there imprisoned said plaintiff, and there kept and detained him a prisoner in as mall, filthy, and unwholesome prison on and from the 28th day of August aforesaid to and on the 3d day of September, 1862, without lawful authority, or any reasonable or probable cause, against the law of this State, and against the will of said plaintiff, and other injuries to him, said plaintiff, then and there did, by means of which said plaintiff was compelled to, and did necessarily pay or become liable to
12 pay, divers sums of money in and about procuring sureties, and executing a bond required by defendants as a condition of his discharge from such imprisonment, and in and about procuring counsel and aid and assistance in and about procuring such discharge, and in procuring food while so imprisoned, and in paying his fare and necessary expenses in returning from said city of New York to his said residence, amounting in all to the sum of one hundred and forty dollars, as near as the plaintiff can state, and was prevented from attending to his ordinary affairs and business for the space of one week and over.

Wherefore, and by means of the premises, the plaintiff has sustained great damage, and demands judgment against said defendants for the sum of ten thousand dollars.

WATSON & GRISWOLD,
Plaintiff's Attorneys.

GREENE COUNTY, *ss*:

Albert W. Patrie, the plaintiff named in the foregoing complaint, being duly sworn, deposes and says, that said complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ALBERT W. PATRIE.

Subscribed and sworn to before me January 13th, 1863.

ALANSON LATHROP,
Justice of the Peace.

13 New York supreme court.

ALBERT W. PATRIE, plaintiff,
against
ROBERT MURRAY and WILLIAM BUCKLEY, defendants.

The above-named defendants in this action by Vail & Sedgwick, their attorneys, for answer to the complaint of the above named plaintiff herein, state and show to the court as follows:

First. The said defendants, except as hereinafter stated, deny each and every allegation contained in said complaint from the beginning to, and including the words, "then and there did" in the third folio thereof, and as to all the other allegations of said complaint, each of the said defendants for himself says that he has no knowledge or information sufficient to form a belief.

Second. And for a further and separate defence the said defendants say that at the times mentioned in said complaint, the said defendant, Robert Murray, was the marshal of the United States of America for the southern district of New York, and that the said defendant, William Buckley, was the deputy of said marshal;

14 that on or about the 28th day of August, 1862, the said Robert Murray, as such marshal was, by the lawful order of the President of the said United States, directed to take into custody the said plaintiff, Albert W. Patrie, and that the said William Buckley as said deputy of said marshal, was directed by said Robert Murray, as said marshall, under and in pursuance of said lawful order, to execute the said order of the said President, and that said William Buckley, acting as such deputy for said marshal, and in pursuance of his said direction, did on or about the said 28th day of August, in a lawful manner, and without violence or force, execute said lawful order, and take said plaintiff into custody, and that said plaintiff during all the time he was in custody as aforesaid was kept in such custody under and in pursuance of said lawful order of said President, and not otherwise.

Wherefore, the said defendant pray that the said complaint may be dismissed, and the plaintiff adjudged to pay their costs and expenses in defending this action.

VAIL & SEDGWICK,
Defendants' Attorneys, 98 *Broadway*, *N. Y.*

15 CITY AND COUNTY OF NEW YORK, ss:

Robert Murray and William Buckley, the defendants in this action, being duly and severally sworn, each for himself, doth depose and say that the foregoing answer is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

ROBERT MURRAY.
WILLIAM BUCKLEY.

Sworn this 27th day of May, 1863, before me.

HENRY H. RICE,
Notary Public, N. Y. City.

[U. S. inter. rev. stamp, 5c., cancelled.]

That issue in said cause was joined on the 28th day of May, 1863.

That no attempt was ever made by the defendants therein to remove said cause into the circuit court of the United States before the trial thereof as hereinafter stated.

That after the joining of issue in said cause, it was noticed on both sides for trial at the Greene circuit, and was put over at two several circuits held in said county of Greene, on affidavits in behalf of the defendants therein, on the ground of the absence of witnesses material to the defence.

That said cause was tried at a circuit court held in and for
16 said county of Greene, before the honorable Charles R. Ingalls, one of the justices of the supreme court of said State of New York, with a jury, on the 7th day of June, 1864, in its regular order on the calender; that counsel on both sides were present, and took part in the trial throughout, challenging jurors, examining and cross-examining witnesses, and that witnesses were called and examined on said trial, as well on the part of the defence as of the plaintiff; and that, after two hours deliberation, the jury returned a verdict in favor of the plaintiff for nine thousand dollars, on which the judgment described in said alternative mandamus was entered on said 8th day of June, 1864.

That the assault and battery and false improvement proved on said trial, and for which said verdict was given, took place in the months of August and September, 1862, and not at any earlier or later period.

That no evidence was given on said trial in support of the second subdivision of the answer above set forth, nor was it proved, claimed, or pretended on said trial, by or in behalf of the defendants therein,
that said Patrie had been engaged, or that the defendant, be-
17 lieved he had been engaged by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States.

That no question was raised or decided on said trial under any act of Congress, nor was the court asked to decide, nor did it decide, on said trial any question arising under the Constitution or laws of the United States, any treaties made by the United States, or under their authority, nor was any such question submitted to or decided by said jury; that the parties to said suit were all citizens of the State of New York, and that no question was raised or decided on said trial on article III, section 2, of the Constitution of the United States.

That no case or bill of exceptions was made on the part of the defendants, and that no steps have been taken to obtain a new trial in said supreme court, or to have the facts tried by said jury re-examined in any court according to the rules of the common law.

That no judgment has been recovered between said parties in said alternative mandamus mentioned, except the judgment so entered as
aforesaid on said verdict of a jury, and that said jury was com-
18 posed of twelve men, duly qualified and sworn, according to the course and practice of the common law.

Wherefore, the said justices and clerk of said supreme court say that the said circuit court of the United States has not acquired jurisdiction of the said suit in favor of said Patrie against said Murray and Buckley, and cannot compel a removal of the same by said writ of error, and a new trial of the same in the said circuit court of the United States.

AMASA J. PARKER,
Albany, N. Y., Attorney.

And the said United States and the said relators by Blachford, Seward and Griswold, their attorneys, come and demur to the said answer and return of the said justices and clerk as follows:

C. C., U. S. S. D., N. Y.

THE UNITED STATES, ex relatione, Robert Murray, and William Buckley,
vs.
THE JUSTICES OF THE SUPREME COURT OF the State of New York for the third judicial district, and for the county of Greene, and the county clerk of said county.

19 And the said United States and the relators aforesaid, by Blachford, Seward and Griswold, their attorneys, come and say, that the said answer and return of the said justices of the supreme court of the State of New York for the third judicial district, and for the county of Greene, and of the county clerk of the said county, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to quash the said alternative writ of mandamus, and that they, the said United States and the said relators, are not bound by the law of the land to answer the same, and this they are ready to verify.

Wherefore, for want of a sufficient answer and return in this behalf, the said relators pray judgment, and that the said justices and clerk may answer further to the said alternative writ, &c.

BLACHFORD, SEWARD & GRISWOLD,
Attorneys for the United States and Relators.

And the said the justices and clerk aforesaid join in the said demurrer, as follows:

C. C., U. S. S. D., N. Y.

THE UNITED STATES, ex relatione, Robert Murray and William Buckley
vs.
THE JUSTICES OF THE SUPREME COURT of the State of New York for the third judicial district, and for the county of Greene, and the county clerk of said county.

And the said the justices and the said clerk, by Amasa J. Parker, their attorney, come and say that the said answer and return of the said justices and clerk, and the matters therein contained, are sufficient in law to quash the said alternative writ of mandamus, and which said answer and return, and the matters therein contained, the said justices and clerk are ready to verify and prove as the court here shall direct, &c.

Wherefore, inasmuch as the said United States, and the said relators have not denied nor in any manner answered the said answer and return, the said justices and clerk as before pray judgment of the said alternative writ of mandamus, and that the same may be quashed, &c.

AMASA J. PARKER,
Attorney for the said Justices and Clerk.

And because the aforesaid justices hereof, now here, are not yet advised what judgment to give of and upon the premises, therefore the process thereof is continued between the parties aforesaid
21 upon the writ aforesaid in this same court before the justices thereof, until the 19th day of November, in the same term and at the place aforesaid, and the same day is given to the parties aforesaid at the same place.

At which day, before the justices aforesaid, at the place aforesaid, came the parties aforesaid, by their attorneys aforesaid, whereupon all and singular the premises aforesaid being seen by the court now here, and fully understood, and mature deliberation being thereupon had, for that it appears to the said court, now here, what the said answer and return of the said justices and clerk, and the matters therein contained, are not sufficient in law to quash the said alternative writ of mandamus of the United States and the said relators, whereupon the said United States and relators pray judgment, and also a writ of peremptory mandamus, to be directed to the said justices and clerk commanding them, as in said alternative writ is specified.

Wherefore, it is considered that a writ of peremptory mandamus do forthwith issue, directed to the said justices and clerk, commanding them, upon pain and peril that shall fall thereon, to re-
22 move and transfer into the circuit court of the United States, for the southern district of New York, a certain judgment, and

the record thereof now remaining on file in the office of the said clerk, and which judgment was rendered on the 8th day of June, 1864, at a circuit court and special term of the supreme court of the State of New York, held in and for the third judicial district and county of Greene, at Catskill, in said county, in a certain suit then and there pending in the said supreme court before the said justices, or one of them, wherein Albert W. Patrie was plaintiff and Robert Murray and William Buckley were defendants, and which judgment was entered and docketed in the office of the clerk of the said supreme court, and of the said county of Greene, in favor of the said Patrie against the said Murray and Buckley, for the sum of nine thousand three hundred and forty-three dollars and thirty-four cents damages and costs, according to the command of the said former writ of alternative mandamus, and that they do proceed no further in said cause.

S. NELSON.

Judgment signed the 20th day of Nov., 1866.

KENNETH G. WHITE, *Clerk*.

Endorsed: C. C. U. S. S. D., N. Y. The United States, ex relatione, Robert Murray *et al.*, *vs.* The justices of the supreme court of the State of New York for the third judicial district and for the county of Greene and the county clerk of said county. Judgment Record. Blachford, Seward and Griswold, atty's for United States and the relators, No. 29 Nassau st., N. Y. Filed, Nov. 20, 1866.

23 Supreme Court of the United States.

THE JUSTICES OF THE SUPREME COURT OF THE State of New York for the third judicial district and for the county of Greene, and the county clerk of said county, plaintiffs in error,	In error.
vs.	
THE UNITED STATES, ex relatione, ROBERT MURRAY and WILLIAM BUCKLEY, defendant in error.	

Know all men by these presents, that we, Rufus A. Watson and John A. Griswold, of Catskill, in the county of Greene and State of New York, are held and firmly bound unto the above-named defendants in error, in the sum of five hundred dollars, to be paid to the said defendants in error, their executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this eighth day of December, 1866.

Whereas, the above named plaintiffs in error, have prosecuted a writ of error to the Supreme Court of the United States, to
24 reverse the judgment rendered in the above entitled suit by

the circuit court of the United States for the southern district of New York, on the nineteenth day of November, 1866, against the said plaintiffs in error, on mandamus.

Now therefore, the condition of this obligation is such, that if the above named plaintiffs in error, shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

J. A. GRISWOLD. [L. S.]
R. W. WATSON. [L. S.]

Sealed and delivered in presence of—
A. C. GRISWOLD.

Endorsed: Supreme Court of the United States. The justices of the supreme court of the State of New York *et al.*, plaintiffs in error, *vs.* The United States, &c., &c., defendants in error. Bond for costs on writ of error. Amassa J. Parker, att'y for pl'ffs in error. I approve the within bond as to form and manner of execution and of the sufficiency of the obligors therein. P. A. Smalley, judge. Amasa J. Parker, U. S. commissioner, Albany, N. Y. Filed, Dec. 14, 1866.

25 UNITED STATES OF AMERICA, *ss:*

To the United States, ex relatione, Robert Murray and William Buckley, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerks' office of the circuit court of the United States for the southern district of New York, wherein the justices of the supreme court of the State of New York for the third judicial district and for the county of Greene and the county clerk of said county are plaintiffs in error, and you the said the United States on the relation of Robert Murray and William Buckley, are defendants in error, to shew cause if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-six.

S. NELSON.

Endorsed: In the Supreme Court of the United States. The justices of the supreme court of the State of New York *et al.*, plaintiffs in error, *vs.* The United States, ex rel., Robert Murray and William Buckley. Citation. Amasa J. Parker, att'y, No. 55 State st., Albany, N. Y. Due service of the within citation is hereby admitted. N. Y., Nov. 23, 1866. Blatchford, Seward, and Griswold, att'ys for— Filed, Nov. 24, '66.

27 Supreme Court of the United States.

THE JUSTICES OF THE SUPREME COURT FOR THE State of New York for the third district and for the county of Greene and the county clerk of said county, plaintiffs in error,

vs.

THE UNITED STATES, ex relatione, ROBERT MURray & William Buckley, defendants in error.

Of the December term, A. D. 1866.

Afterwards on the first Monday of December, in this same term before the Justices of the Supreme Court of the United States, at the capitol in the city of Washington, came the said the justices of the supreme court of the State of New York for the third judicial district and for the county of Greene and the county clerk of said county by Amasa J. Parker, their attorney, and say that in the record and proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in these, to wit: that said judgment was given in violation of the seventh article of the amendments to the Constitution of the United States which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," and also that said judgment was given in violation of article three, section two, of the Constitution of the United States, no case having arisen which would give the circuit court of the United States jurisdiction to compel the removal of a suit from a State court. Also that the fourth and fifth sections of the act of Congress of March

28 3, 1863, were unconstitutional and void, and are in violation of the fourth article of the amendments to the Constitution of the United States, which declares that the right of the people to be secure in their persons against unreasonable seizures shall not be violated, and of the fifth article of said amendments which declares that no person shall be deprived of liberty without due process of law.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error, and the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

AMASA J. PARKER,
Attorney for Plaintiffs in Error.

Endorsed: No. 392. U. S. Supreme Court. The justices of the supreme court for the State of New York, *& al.*, plaintiffs in error, *vs.* The United States, ex rel., Robert Murray, *& al.*, defendants in error. Assignment of errors. Amasa J. Parker, att'y. Filed, 18 December, 1866.

29 Supreme Court of the United States.

THE UNITED STATES, ex relatione, ROBERT MURRAY and WILLIAM BUCKLEY, defendants in error,

ads.

THE JUSTICES OF THE SUPREME COURT OF THE State of New York for the third judicial district, and for the county of Greene, and the county clerk of said county, plaintiffs in error.

Of December term, 1866.

And hereupon, afterwards, to wit: on the first Monday of December, in this same term, before the Justices of the Supreme Court of the United States at the capitol, in the city of Washington, came the said United States upon the relation aforesaid by Blatchford, Seward, and Griswold, their attorneys, and say that there is no error either in the record or proceedings aforesaid, or in giving the judgment aforesaid; and they pray that the court now here may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid, above assigned for error, and that the judgment aforesaid given may be in all things affirmed.

BLATCHFORD, SEWARD & GRISWOLD,
Attorneys for Defendants in Error.

Endorsed: No. 392. Supreme Court of the United States. The United States, ex rel., Robert Murray, *et al.*, defendants in error, *ads.* The justices of the supreme court for the State of New York, *et al.*, plaintiffs in error. Joinder in error. Blatchford, Seward & Griswold, attorneys for defendants in error. Filed, 26 December, 1866.

O

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

THE JUSTICES OF THE SUPREME COURT of New York for the third judicial district and for the county of Greene, &c.,

vs.

UNITED STATES EX REL. ROBERT MURRAY and WILLIAM BUCKLEY.

No. 72.

Error to the Circuit Court of the United States for the southern district of New York.

ARGUMENT FOR DEFENDANTS IN ERROR.

WM. M. EVARTS,
Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

THE JUSTICES OF THE SUPREME COURT of the State of New York for the third judicial district, and for the county of Greene, and the county clerk of said county, plaintiffs in error,

vs.

THE UNITED STATES EX REL. ROBERT Murray and William Buckley, defendants in error.

No. 72.

In error to the Circuit Court of the United States for the southern district of New York.

THE CASE.

This is a writ of error to a judgment rendered in the Circuit Court of the United States for the southern district of New York, awarding a peremptory mandamus, directed to the plaintiffs in error, commanding them to remove and transfer into the said Circuit Court a certain judgment and the record thereof, which judgment was given June 8, 1864, at a special term of the Supreme Court of the State of New York, held in the county of Greene, in a suit then and there pending, in favor of Albert W. Patrie, plaintiff, against

Robert Murray and Wm. Buckley, defendants, for the sum of $9,343 34 damages and costs.

The defendants in said suit, who were the United States marshal for the said southern district, and his deputy, were jointly sued for an alleged arrest and false imprisonment of the plaintiff, made in August, 1862, and the defence set up was, that the arrest was made by them in their official capacity, by virtue and under color of authority derived from and exercised under the President of the United States. After judgment, they applied for process, under the provisions of the 5th section of the act of March 3, 1863, (12 Stat., 755,) to remove the suit from the said Supreme Court of the State of New York to the said Circuit Court of the United States, and a writ of error and citation to the former court were accordingly allowed by the latter; but no return being made to the writ, a peremptory mandamus to compel a return was subsequently asked for and granted. Thereupon this writ of error was sued out.

Upon the merits of the case, the arguments for the relators in the court below, on the application for the mandamus, prepared by their learned counsel, (Messrs. Seward and Blackford,) will be submitted as all sufficient for the Attorney General in this court.

Jurisdictional Point.

Preliminarily to the argument on the merits of the case, it is submitted that this court has no jurisdiction, under the 22nd section of the act of 1789, to re-examine a judgment of the Circuit Court, in issuing a writ of mandamus, for the purpose of exercising the jurisdiction conferred upon that court by the 5th section of the act of March 3, 1863, or any other statute.

Ins. Co. *v.* Wheelwright, 7 Wh., 534.

Barry *v.* Mercein, 5 How., 103.

Pratt *v.* Fitzhugh, 1 Black, 271.

POINT I.

Section 5 of the act of Congress approved March 3d, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," (12 *U. S. Stat. at Large*, 755,) provides, that if "any suit or prosecution, civil or criminal, has been or shall be commenced in any State Court against any officer, civil or military * * for any arrest or imprisonment made * * at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, * * * it shall * * be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the Circuit Court of the United States for that district in which such judgment shall have been rendered; and the said Circuit Court shall thereupon proceed to try and determine the facts and the law in such action in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding, * * * and the State Court from which any such action, civil or criminal, may be removed or transferred as aforesaid, upon the parties giving good and sufficient security for the prosecution thereof, shall allow the same to be removed and transferred, and proceed no further in the case." The relators are remediless, so far as regards the staying of the action of the State Court in execution of the judgment, unless this court extends its aid to assist them in enforcing a compliance with these provisions of the act of Congress, and to secure them against further proceedings in the State Court.

Point II.

Such aid is properly to be extended through the instrumentality of a writ of mandamus.

Point III.

The Circuit Courts of the United States have authority to issue writs of mandamus. Section 2 of article 3 of the Constitution extends the judicial power of the Federal Courts "to all cases * * arising under the Constitution and the laws of the United States." The 4th section of the before-cited act of Congress of March 3d, 1863, declares, that "any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence, in all courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest or imprisonment, made, done or committed, * * * under and by virtue of such order, * * and such defence may be made by special plea or under the general issue." The answer of the relators in the State Court having alleged that the arrest of Patrie was made under the authority of the President of the United States, the case immediately came within the constitutional designation of cases over which the Federal Courts have jurisdiction. The only question to be tried in the case, under the issue so framed, are as to the legality of the arrest under the Constitution and laws of the United States, and as to the validity of the defence sanctioned by the 4th section of the act of March 3d, 1863.

The 14th section of the Judiciary Act of 1789 enacts that, "the courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their re-

spective jurisdictions, and agreeable to the principles and usages of law." Under the power thus conferred, the Supreme Court, in the case of *The Board of Commissioners of Knox County* vs. *Aspinwall*, (24 *Howard*, 376,) decided that the Circuit Court have authority to issue writs of mandamus.

Point IV.

If the relators have a right to have the action in the State Court removed into this court, under the writ of error, and to have a stay of proceedings in the State Court, upon the judgment there rendered, a mandamus is the proper writ to effect such removal and stay. This is so, upon both direct and analogous authority.

In *The People* vs. *The Judges of the New York Common Pleas*, (2 *Denio*, 197,) which was a case of an application to the Supreme Court of the State of New York for a mandamus to the Common Pleas, to compel it to grant an order for the removal of a cause into the Circuit Court of the United States, the court said that the writ of mandamus should issue from the Appellate Court, and that it was not aware that any of the Federal Courts had questioned their power to gain possession of a cause by issuing such writ.

In the case of *Spraggins* vs. *The County Court of Humphries*, (1 *Cooke*, [Tennesse], 160,) the Circuit Court of the United States for the district of Tennessee granted a mandamus to compel the State Court to transfer a cause into the Circuit Court.

In *Brown* vs. *Crippin*, (4 *Henning and Munford's Reps.*, 173,) the Court of Appeals of Virginia granted a mandamus to the County Court to compel that court to remove the cause into the Circuit Court of the United States for the district of Virginia.

In *Hopper* vs. *Kalkman*, (17 *California R.*) 517, the

Supreme Court of California, per S. J. Field, Ch. J., decided that an error committed by the State District Court, in refusing to transfer a cause into the Circuit Court of the United States, was to be remedied, not by an appeal to the Supreme Court, but by a mandamus to the District Court.

So, also, the writ of mandamus has been issued to compel a court to hear a cause of which it has jurisdiction, (*Ex parte Milner*, 6 *Eng. Law and Eq.*, 371; *Regina* vs. *Stapleton*, 7 *Id.*, 390;) to compel the issuance of an execution, (*Regina* vs. *The County Court of Surrey*, 12 *Id.* 428;) to compel a Circuit Court to change the venue, (*State* vs. *McArthur*, 17 *Wisconsin*, 407;) to compel a Circuit Court to issue an injunction, (*Ex parte Pile*, 9 *Arkansas*, 336;) to compel a judge, who was interested in a case, to transfer it to another court, (*State* vs. *Castleberry*, 23 *Alabama*, 85;) to compel the Common Pleas to enter judgment for the plaintiff, on a verdict which it had erroneously set aside, with an award of a new trial, (*Cortleyou* vs. *Ten Eyck*, 2 *Zabriskie*, 41;) to compel a Surrogate to grant an appeal given by statute, (*Gresham* vs. *Pruyn*, 17 *Georgia*, 263;) to compel the Common Pleas to give judgment on a verdict on which it had arrested the judgment for insufficiency in the declaration, (*Foot* vs. *Weatherwax*, 2 *Johns. C.*, 215;) to the Court of Sessions, to compel the entry of a judgment on a conviction for felony, which the Sessions judge had set aside as against the weight of evidence, (*The People* vs. *The Justices, &c.*, 1 *Johns. C.*, 179;) to the Common Pleas to amend a bill of exceptions according to the truth, (*Sikes* vs. *Ransom*, 2 *Johns.*, 79.)

Point V.

It is the obvious intention of the act of March 3d, 1863, to make the Circuit Court of the United States an appellate tribunal. In the designated cases, a

writ of error is the proper method of initiating such appellate proceedings, and, in aid of such appellate proceedings, a mandamus is held to be a proper remedy. (*The King* vs. *The Justices of Wiltshire*, 1 *East*, 683.)

Point VI.

If the act of 1863 is constitutional, and the relators brought themselves within its terms, then, according to the decision of the Supreme Court in the case of *Gordon* vs. *Longest*, (16 *Peters*, 97,) the State Court had "no discretion to withhold that right." After the allowance and service of the writ of error and citation, the functions of the State Court are purely ministerial, namely, to make return to the writ and to stay proceedings in the State Court.

Point VII.

Unless the writ is granted as prayed for, the relators will be remediless, even though this court should take cognizance of the case, on the writ of error, without any return to it by the State Court, as was done by the Supreme Court in *The United States* vs. *Booth*, (18 *Howard*, 476, and 21 *Howard*, 506–512.)

1. The relators cannot procure in the State Court a revisal of the order denying a stay of proceedings in any other manner; but even if they could, they are not bound to apply to the State Court. In *Kanouse* vs. *Martin* (15 *Howard*, 198) Mr. Justice Curtis, in delivering the opinion of the court, said: "The defendant's right being complete, he could not be required, consistently with the act of Congress, to follow it further in the Court of Common Pleas." In the case of *Gordon* vs. *Longest* (16 *Peters*, 97) McLean, J., said: "A more summary remedy might have been pursued by the defendant than the one

which the court can now give to him," meaning, of course, a mandamus.

2. But, even if this order refusing to stay proceedings were appealable in the State Court, which the authority cited from the California reports decides it not to be, the question arising in the case could not be brought by appeal under the 25th section of the Judiciary Act of 1789, before the Supreme Court of the United States for review. That section provides that a writ of error may issue to the highest court of the State to bring up for review a final judgment or decree, and that on the examination of such final judgment or decree the Supreme Court may redress any error committed by the State Court, and necessarily resulting in the judgment so to be brought up. The question of the right to remove the cause into this court does not arise upon the judgment, or upon the record of the judgment, or upon anything which transpired in the action prior to the rendition of the judgment. It arises *dehors* the judgment record, and subsequently to the rendition of the judgment, and could not, therefore, be taken to the Supreme Court by a writ of error from the judgment, issued under the Judiciary Act of 1789. The question arises out of the allowance and service of the writ of error from this court, and the refusal of the State Court to make return thereto, and to arrest proceedings in the action in the State Court. Such writ of error, and the citation and the proof of service thereof, did not form part of the judgment record in the State Court, nor did they in any way effect the rendition of the judgment. By no other means, therefore, than by an application for a mandamus, can the question of the right of the relators, under the act of 1863, to have the cause transferred after judgment into this court, be investigated by it or by any court of the United States.

Point VIII.

The act of March 3d, 1863, is constitutional.

1. It has been sustained by the Supreme Court of the State of New York for the first judicial district, in the case of *Jones* vs. *Seward*, (17 *Abbott's Pr. R.*, 377, which was a case precisely parallel with the present one, so far as the defence is concerned—the defence in that case being, that the act committed by the defendant was done under and by virtue of authority derived from and exercised under the President of the United States. The court, in its opinion, said: "The defence in this case arises under the act of Congress, and the validity of that act, considered in the light afforded by the Constitution, will be one of the principal subjects to be determined at the trial. * * * Congress has enacted that the defendant may interpose in his defence the orders, &c., of the President, and has directed the transfer of cases involving such a defence, in the manner prescribed, into the Circuit Court. According to the statements of the defendant, such a case has arisen. We have nothing to do with the validity of the law as a defence to the action. It is sufficient for the State Court that the defence involves the construction and effect of the law of Congress. I am of opinion that Congress has the power to direct the transfer of such cases."

In the case of *Hodgson* vs. *Millward*, (20 *Legal Intelligencer*, 164,) the action was brought against the United States marshal for the eastern district of Pennsylvania for false imprisonment. He justified in the State Court under the authority of the President. The cause was tried by a jury, and a verdict rendered for the plaintiff. After verdict, the defendant filed his petition in the State Court for the removal of the cause into the Circuit Court of the United States. An objection was made to the removal, that the petitioner was too late with his petition, and that the act of 1863

was unconstitutional. Both objections were overruled by the State Court, in a well-considered opinion, and the cause was directed to be removed into the Circuit Court of the United States. An application was then made (20 *Legal Intelligencer*, 348) to Mr. Justice Grier, in the Circuit Court of the United States, to remand the cause. He said: "We see no reason to doubt the correctness of the decision of the learned judge who has certified this case, and fully concur in the opinion delivered by him in this case, and it would be superfluous to repeat the argument so well stated by that learned judge. It is clear that the defence of the defendants, if they have any, depends wholly on the construction of the Constitution of the United States and of acts of Congress. The courts of the United States have, therefore, jurisdiction of the subject-matter, without regard to the citizenship of the parties. The order or warrant under which the defendants justify, purported to have been issued by virtue of authority derived from the President. This was color of authority, whether the substance existed or not. If the State Court should assume to refuse to certify the case into this court because, in *their* opinion, the superior officer had not authority, or the warrant was irregular and void, they would deny the party the privilege conferred upon him by the act, and treat its provisions with contempt. This case is, therefore, properly certified into this court, and must be tried in the same manner as if brought here by appeal, or as if it had been brought in said court by original process."

In the case of *Kees* vs. *Tod*, (*MS.*,) in the Supreme Court of Ohio, the defendant justified under the authority of the Secretary of War, and filed his petition for the removal of the cause. The application was contested on the ground that the act of 1863 was unconstitutional, and the objection was overruled.

In the case of *Kulp* vs. *Ricketts*, (*MS.*,) a like de-

cision was arrived at in the Common Pleas of Luzerne county, Pennsylvania.

The State Court based its refusal in *Patrie* vs. *Murray* (20 *Howard's Pr. R.*, 312) to grant the stay of proceeding asked for by the relators, upon two grounds: *First*, that the case, upon the facts presented, was not within the act of Congress ; and *secondly*, that the provisions in the fifth section of the act of 1863, authorizing the removal of a cause after judgment, were in violation of the seventh amendment to the Constitution of the United States; and it supported this latter objection by a reference to the case of *Weatherbee* vs. *Johnson*, (14 *Mass. Rep.*, 412.)

a. The first position is overthrown by the authorities already cited.

b. The second position is untenable. The seventh amendment to the Constitution has no reference whatever to suits tried in the State courts. It refers solely to the courts of the United States, and to suits tried by jury therein, and was intended to deprive them of jurisdiction to investigate the facts of a case which had once been tried by a jury in a court of the United States, in any other way than on a writ of error.

The fourth amendment, which is equally broad, and provides that no search warrant shall issue but upon probable cause, &c., was decided by the Supreme Court, in the case of *Smith* vs. *Maryland*, (18 *Howard*, 71,) to have no application to State process; and the fifth amendment, which provides that private property shall not be taken for public use without just compensation, has been decided to be a limitation of the power of the general government only, and to have no application to the legislation of the several States. (*Barron* vs. *Mayor of Baltimore*, 7 *Peters*, 243.) So, too, in *Lessee of Livingston* vs. *Moore*, (7 *Peters*, 551,) the Supreme Court, with one sweep of its hand, disposes of this whole question, in this lan-

guage: "As to the amendments of the Constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the States; and this observation disposes of the next exception, which relies on the 7th article of those amendments." The same principle is enunciated in *Fox* vs. *The State of Ohio*, (5 *Howard*, 434.)

c. If the 7th amendment is applicable to the State courts, then the statute of the State of New York, (2 *R. S.*, 309,) which gives a defendant in ejectment a right to three consecutive jury trials in the same case, is unconstitutional and void.

d. The amendment has relation only to the courts of the United States; and, if this be so, then its inhibition is only against the re-trial of causes which have once been tried in the courts to which the amendment relates, to wit, in the courts of the United States. This is logically unanswerable.

e. The Constitution of the United States, article 3, section 1, provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish." And, by section 8, subdivision 10, Congress is clothed with power to constitute tribunals inferior to the Supreme Court. Congress has created Circuit Courts of the United States. By section 2 of article 3 of the Constitution, the judicial power of the United States is declared to extend "to all cases in law and equity arising under this Constitution, the laws of the United States," &c. A case is said to arise, within the meaning of the Constitution, whenever any question respecting the Constitution, laws or treaties of the United States has assumed such a form that the judicial power is capable of acting upon it, (*Osborn* vs. *The United States Bank*, 9 *Wheaton*, 819;) or, whenever its correct decision depends on the construction either of the Constitution or of a law of the United States. Inasmuch as Judge

Grier decided, in the case of *Hodgson* vs. *Millward*, that the defence of the marshal in the Pennsylvania district, which was similar to the defence of the relators here, "depends wholly on the construction of the Constitution of the United States and of acts of Congress," it would seem to be unnecessary to amplify the argument, that the present case is within the constitutional limitation. The present case, therefore, is one of which the Federal Courts have, under the Constitution, jurisdiction, and to which their judicial power extends. It was only necessary, therefore, for Congress to vest that jurisdiction in the Circuit Court of the United States.

In *Osborn* vs. *The Bank of the United States*, above cited, the court said: "We think, then, that when the question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original case, it is in the power of Congress to give the Circuit Court jurisdiction of that cause, although other questions of fact or of law may be involved in it." Wherever it has been practicable to establish an original jurisdiction in courts of the United States, for cases which arise directly and necessarily from a law of the United States, such a jurisdiction has been created, and has generally been made exclusive. Thus, the original jurisdiction over crimes and offences against the laws of the United States, over seizures for breaches of the revenue laws, and over cases arising under the patent and copyright acts, has been made exclusive, either in the Circuit of District Court. So, also, the original admiralty jurisdiction has been made exclusive, and the jurisdiction in suits against ambassadors and counsels. On the other hand, where it has not been practicable to establish an original jurisdiction for other classes of cases arising under the Constitution and laws of the United States, such as those where the construction or supremacy of the Constitu-

tion or laws are drawn in question incidentally, in the progress of the cause, the judicial power has been extended to them in the appellate form, and no original jurisdiction has been established. (*Curtis's Commentaries, section* 131.)

It was said in *Slocum* vs. *Mayberry*, (2 *Wheaton*, 1,) that Congress had refused to the courts of the Union the power of deciding on the conduct of their officers in the execution of their laws, in suits at common law, till the case should have passed through the State courts, and have received the form which might there be given. Congress, if it had seen fit to do so, could have enacted a law conferring upon the Circuit Courts original jurisdiction of *all* cases arising under the laws and the Constitution of the United States; but, in the language of the Supreme Court, it refused to do so, and left such cases to be examined in the Federal Courts, solely by the exercise of an appellate jurisdiction.

Thus the act of 1789 gave a writ of error from the Supreme Court in a given case, and the act of 1863 gives a writ of error to the Circuit Court, in a case like the present. It would have been competent for Congress to have said that any suit against any officer, for any act done during the rebellion, might be brought originaly in the Circuit Court. It would not have been constitutional, perhaps, to have deprived a citizen of the right to sue for a personal tort in the courts of the State; but it would have been perfectly competent for Congress to have clothed the Circuit Court with concurrent jurisdiction with the State Courts over such causes of action, by providing that such action might be originally instituted in the Circuit Courts. Congress has not seen proper to do so, however, directly. It has done so indirectly, by authorizing the removal of such a cause, at the request of the defendant, into the Circuit Court, and has provided that when the cause is so removed it shall

proceed in like manner as if it had been commened in the Circuit Court by original process.

If the right be conceded to exist in Congress to clothe the Circuit Courts with such original jurisdiction, concurrent with the State Courts, then the question here presented is resolved into a simple criticism upon the *mode* by which that jurisdiction has been conferred. If Congress had said to a plaintiff, "You may sue in the Circuit Court," such declaration would have been constitutional. It has said to a defendant: "If you are sued in a State court, you may remove the cause into the Circuit Court, and when there, it shall proceed in like manner as if had been brought there by the plaintiff originally." The alleged unconstitutionality results, therefore, from a citicism upon the formal mode of procedure by which Congress has exercised its conceded power of vesting the Circuit Court with jurisdiction over cases like the present.

It is too late now to discuss the constitutionality of the act authorizing the removal of causes. The judiciary act of 1789, as well as the revenue acts, have been too long and too frequently sustained to be considered now as open to discussion. There is no legal distinction between the right to remove a cause under the act of 1863, and the right to remove one under the act of 1789. The method of procedure is the same in both, so far as the removal of the cause before issue joined. It is not perceived how the provisions of the act of 1863, which enlarge the time for removal, and designate different stages of the case as proper times for applying for the removal, can be said to be unconstitutional. If Congress has the power to vest the Circuit Courts with original or appellate jurisdiction, it certainly has the lesser right to declare the mode by which and the time at which such jurisdiction shall be acquired, and it is not competent for a State court to refuse to assent to the exercise of conceded jurisdiction, upon the ground of dissatisfaction with

the mode and time prescribed by Congress for the acquisition of such jurisdiction by the Federal Courts. The greater includes the less. If the right exists to confer the jurisdiction, the right, of necessity, also exists to prescribe the time and place, and manner of acquiring the jurisdiction. This principle would seem to be settled beyond contestation by the Supreme Court in the case of *Martin* vs. *Hunter's Lessee*, (1 *Wheat.*, 304.) Mr. Justice Story, in delivering the opinion of the court in that case, said: "This power of removal is not to be found, in express terms, in any part of the Constitution. If it be given it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law, in criminal as well as in civil cases, and it is exercised before as well as *after* judgment. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power; and, as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal *either before or after judgment.* The time, the process and the manner must be subject to its absolute legislative control. If the right of removal from State Courts exists before judgment, because it is included in the appellate power, it must, for the same reason, *exist after judgment.* Precisely the same objections therefore exist as to the right of removal before judgment as after, and both must stand or fall together." It is too late now to question the power of Congress to authorize the removal of cases from State Courts at such "time," and by such "process" and in such "manner" as it may prescribe.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOR THE THIRD JUDICIAL DISTRICT, AND FOR THE COUNTY OF GREENE, AND THE COUNTY CLERK OF SAID COUNTY, *Plaintiffs in Error*,

versus

THE UNITED STATES, EX REL. ROBERT MURRAY AND WILLIAM BUCKLEY, *Defendants in Error.*

STATEMENT.

In January, 1863, a suit was brought in the Supreme Court of the State of New York, by Albert W. Patrie against Robert Murray and William Buckley, for assault and battery and false imprisonment, alleged to have been committed on the 28th August, 1862, and on several days immediately following. Issue was joined on 28th May, 1863. The cause was twice noticed by both parties for trial at the Greene County Circuit, and was put over at each Circuit by the defendants on affidavits of the absence of witnesses. (Fol. 15.)

The cause was tried at the Greene Circuit, before Mr. Justice Ingalls and a jury, on the 7th June, 1864, in its regular order on the Calendar. Counsel were present on

both sides, and took part in the trial throughout, challenging jurors, examining and cross-examining witnesses; and witnesses were called and examined on both sides. After two hours' deliberation, the jury returned a verdict in favor of the plaintiff for $9,000, on which judgment was entered on the 8th June, 1864. (Fol. 16.)

The assault and battery and false imprisonment proved on the trial, and for which the verdict was given, took place in August and September, 1862, and not at any earlier or later period.

No evidence was given on the trial in support of the allegation in the second division of defendants' answer (fols. 13 and 14), viz., that the acts in question were done by order of the President of the United States, or under his authority. (Fol. 16.) Nor was it proved, or pretended, on the trial, that Patrie had been engaged, or that the defendants believed he had been engaged, by act, speech or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States. (Fol. 17.)

No question was raised or decided on said trial under any act of Congress; nor was the Court asked to decide on said trial any question arising under the Constitution or laws of the United States, or any treaties made by the United States; nor was any such question submitted to or decided by the jury. The parties to the suit were all citizens of the State of New York, and no question was raised or decided, under Article III, section 2, of the Constitution of the United States, which prescribes the limits of the judicial power conferred on the Federal Courts. (Fol. 17.) No case or bill of exceptions was made on the part of the defendants, and no steps were taken to obtain a new trial, or to have the facts tried, re-examined, according to the rules of the common law.

The Jury that tried the cause consisted of twelve men, duly qualified and sworn, according to the cause and practice of the common law.

In December, 1864, an application was made to the Supreme Court of the State of New York for an order removing the cause into the United States Circuit Court for the Southern District of New York, but, after full argument, the application was denied, and the decision on appeal was affirmed at the General Term.

Patrie v. Murray, 43 Barb. R., 331, and S. C., 29 How. P. Rep., 312.

After that decision the further defense seemed to be abandoned. and, at the request of defendants, and on promise of payment, attempts to enforce payment were delayed, and nothing further was done till June, 1866, when on filing a writ of error, an application was made to the United States Circuit Court for the Southern District of New York, for an alternative mandamus, requiring the justices and clerk to remove the record into said United States Circuit Court, or show cause. Such alternative writ was granted by Mr. Justice Nelson, and the justices and clerk answered, setting forth the facts above stated, and other particulars as set forth in the printed case, beginning at folio 9, and ending at folio 19.

The relators demurred to the answer; judgment was given for the relators, and the justices and clerk removed the case by writ of error to this Court.

The attempt to remove this case to the Circuit Court of the United States is made under section 5 of the Act of Congress of March 3, 1863, entitled "An Act relating to "*habeas corpus*, and regulating judicial proceedings in cer- "tain cases," which provides that if "any suit or prosecution, "civil or criminal, has been or shall be commenced in any "State Court, against any officer, civil or military * * * "for any arrest or imprisonment made * * * at any "time during the present rebellion, by virtue or under color "of any authority derived from or exercised by or under "the President of the United States * * it shall * * "be competent for either party within six months after the

"rendition of a judgment in any such cause, by writ of error "or other process, to remove the same to the Circuit Court of "the United States for that district in which such judg- "ments shall have been rendered; and the said Circuit Court "shall thereupon proceed to try and determine the facts, and "the law in such action in the same manner as if the same "had been there originally commenced, the judgment in such "case notwithstanding," &c., &c.

The 4th section of the same act declares that "any order "of the President, or under his authority, made at any time "during the existence of the present rebellion, shall be a "defense in all Courts, to any action or prosecution, civil or "criminal, pending or to be commenced, for any search, "seizure, arrest or imprisonment made, done or committed "* * * under and by virtue of such order * * and "such defense may be made by special plea or under the "general issue."

POINTS.

FIRST. The act of Congress allowing a writ of error to remove a case, after it has been tried by a jury in a State Court, to the United States Circuit Court, for the sole purpose of trying the facts again by a jury, as if it had been originally commenced there, is unconstitutional and void, because it is in conflict with the seventh amendment to the Constitution of the United States, which declares, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Weatherbee v. Johnson, 14 Mass., 412.
Patrie v. Murray, 43 Barb., 331.
S. C., 29 Howard's Prac. R., 312.

The case in 14 Mass. will be found to be precisely in point; and the question is fully examined in the opinion of the Court in 43 Barb.

In Fox v. The State of Ohio, 5 How. R., 434, the Supreme Court of the United States, by Mr. Justice Daniel said: "These amendments to the Constitution are exclusively restrictions upon Federal power, intended to prevent interference with the rights of the states and of their citizens."

Ch. J. Parker, in 14 Mass. R., 420, gives the reason then fresh in the memory, which led to the adoption of this amendment, viz., that after a trial by a jury in a State Court in the vicinage, the fact should not be retried in a Federal Court which might take place at an inconvenient distance, and that all appellate jurisdiction which before had extended to both law and fact, now should be restricted to questions of law.

What is said by Ch. J. Parker, is fully sustained by reference to the speech of Mr. Madison on the subject, reported in vol. 1, Debates in Congress, by Gales, old series, page 458. See also the latter part of No. LXXXI of "The Federalist," where Mr. Hamilton states the objections made to the Constitution as it then stood, and discusses the proposed change. The only question was, whether the Federal Courts should have power to review questions of facts by a new trial, on appellate jurisdiction from State Courts. M 82-83

The following is the history of the amendment:

The 2d clause of the 2d section of art. 3, reads as follows: "In all cases affecting ambassadors, &c., &c., &c., the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

To this it was proposed by the committee, of which Mr. Madison was chairman, to add:

"But no appeal to such Court shall be allowed when the value in controversy shall not amount to —— dollars,

nor shall any fact triable by jury according to the course of the common law be otherwise re-examinable than may consist with the principles of the common law."

Debates in Congress, by Gales, old series. Vol. 1, 1789-90, page 452.

It will thus be seen that the amendment was proposed for the purpose of restricting the appellate jurisdiction of the Supreme Court of the United States over the State Courts, and that the trial by jury referred to was a trial in a State Court.

The amendment was again discussed, as reported on page 784 of the volume cited, purely with reference to the appellate jurisdiction from State Courts, and the last clause was amended so as to read, "be otherwise re-examinable, than according to the rules of the common law."

The only important change subsequently made, was to extend the prohibition to "any court of the United States," and so it was finally adopted.

The case in 14 Mass., has never been questioned.

In Davidson v. Burr, 2 Cranch. Cir. C. R., 515, and in Maddox v. Stewart, Ibid. 523, it was held, that after a trial by jury before a justice of the peace, there could be no review of the questions of fact in the Circuit Court of the United States, because of the seventh amendment of the constitution.

See also Curtis's Commentaries on the Const., sec. 17, and note.

It is respectfully submitted, that the seventh amendment is a full and complete answer to this application.

SECOND. Independent of the question raised under the first point, it was not in the power of Congress to confer upon the United States Circuit Court appellate jurisdiction in this case.

Congress can confer no jurisdiction on the Federal Courts, when the Constitution has given none. The jurisdiction cannot be enlarged by Congress.

Marbury v. Madison, 1 Cranch., 174.
Approved in Cohens v. Virginia, 6 Wheaton, 264.
Conklin's Treatise, 3 ed., 60, 138.

The only clause of the Constitution under which the jurisdiction is claimed is as follows: Const. U. S. Art. 3, sec. 2.

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made," &c.

Here no "*case has arisen*," either under the Constitution or the laws of the United States.

Where an action, plainly within the State jurisdiction, is brought in a State Court, a "case" does not "arise" within the meaning of the Constitution, which will take away the jurisdiction of the State Court and confer it on a United States Court, by simply pleading, among other things, that the injury was done by virtue of an act of Congress, or, as in this case, still more remotely, that it was done by an order of the President, which Congress has made a defense.

Merely asserting such a defense, among other defenses in the answer, is not what is meant by a "case arising." No such question may be raised on the trial, and if so, the United States Court would have no jurisdiction, and its judgment would be void. The defendant may have other available defences, or he may have no defense at all, not even a pretense of the truth of the one set up in the answer; in those cases, also, the United States Court would have no jurisdiction.

A "case" does not "arise" on the mere *assertion* of such a defense. It only arises when the question is *necessarily* involved or actually raised on a trial.

"A case arises within the meaning of the Constitution, whenever any question respecting the Constitution, laws and treaties of the United States has assumed such a form that the judicial power is capable of acting upon it."

Osborne v. U. S. Bank, 9 Wheaton, 819.

And "that power is capable of acting only when the subject is *submitted to it by a party*, who asserts his rights in the form prescribed by law. It then becomes a case."

Curtis' Commentaries, § 7.

It is not enough, therefore, for a party to assert that he has such a defense—he must submit such a question for the determination of the Court, so "that the judicial power is capable of acting upon it."

In no case has Congress the power to confer jurisdiction, either original or appellate, unless "a case arises."

This view is entirely consistent with what is said in Osborne v. Bank of U. S., 9 Wheaton, 738. In that case, the suit was brought in the United States Court by virtue of an act of Congress, and a case, therefore, arose under an act of Congress, for the question of the validity of that act of Congress was necessarily involved at every stage of the suit. The suit could neither have been commenced or carried on without it.

But it is not so where an act of Congress is only pleaded, among other things, by way of defense, and where the question may or may not be raised on the trial or involved in the litigation.

Nor does any case arise under the *Constitution* by the defendants giving notice of such a defense; a case under the Constitution is still more remote than a case under the act of Congress, for that will depend not only on the fact whether the defendant shall raise the question of the act of Congress at the trial, but also on the further

and more remote question whether the plaintiff shall raise the question of the unconstitutionality of that act of Congress.

In every suit brought in a State Court, it is in the power of the defendant, among other defenses pleaded, to give notice that he will prove the act was done by order of the President of the United States, though there may be no foundation whatever for such a defense. Can the idea be tolerated that he may go to trial in the State Court, defend there unsuccessfully on other grounds, and then have the right to another chance and a second trial in the United States Circuit? He may not attempt, in the United States Court, to prove any such defense—that cannot be ascertained till the end of the second trial; yet he may, by such a trick, secure two trials.

The above reasoning, if sound, would have precluded the removal of this cause to the United States Circuit Court, on the mere pleading, *before* trial; but in this case we have even a stronger position in the fact that this cause has been *tried, and no such question was raised.*

If any presumption arose from the answer, it is rebutted by the fact that it is now shown to have been unfounded by the different defense actually set up on the trial.

It should not be forgotten that, in this case, no attempt was ever made by the defendants to remove this suit before trial.

THIRD. The 4th and 5th sections of the act of March 3, 1863, are unconstitutional and void, because Congress has no power to make the arbitrary will of the Presi-

dent the law of the land, and to make his mandate a defense for any crime that could be committed.

Benjamin v. Murray, 28 How. Pr. R., 193 overruling Jones v. Seward, 26 How., 433, and 17 Abbot Pr. R., 377.
The People v. Murray, 5 Park. Cr. Rep., 596, 603.
Griffin v. Wilcox, 21 Ind. R., 370.
State of Ohio v. Bliss, 10 Pittsburgh Law Journal, 304.

A *legal* act done needs no such protection as that given by the 4th section. It is only intended to be available to protect and justify *illegal* acts, and it is therefore a violation of amendment 4 of the United States Constitution, which declares that the right of the people to be secure in their persons against unreasonable seizures shall not be violated, and of act 5, which declares, that no person shall be deprived of liberty, without due process of law

The powers of Congress are conferred and limited by the Const. U. S., art. 1, sec. 8.

"The Constitution of the United States is a grant, not a limitation of power. Congress can exercise no powers except those expressly delegated."

Sedgwick on Const. Law, 589.

"The powers actually granted must be such as are expressly granted, or by necessary implication."

Marshall, Ch. J. Martin v. Hunter's Lessee, 1 Wheat., 305, 326.

It cannot be necessary to argue at any length to show that Congress has no power to clothe the President and his officers with arbitrary, despotic and irresponsible power over the lives and persons of the people, and to take away from a citizen, by his will alone, all protection of the law.

But this is even worse still, for it is an attempt to

apply such an act of Congress to a transaction which happened six months before the act was passed.

FOURTH. But it is said the constitutionality of the 4th section is not necessarily involved in this case; that it is only to be raised on a trial of the cause on the merits.

I concede the constitutionality of the fourth section is not involved in this case, unless its unconstitutionality vitiates necessarily the fifth section under which this removal is sought to be made, but I claim that such is its legal effect.

The fifth section rests npon the fourth, and is auxiliary to it. It could not stand alone. Strike out the fourth section, and the fifth is meaningless and inoperative.

It is only to enable a party to make available the unconstitutional defense given by the fourth section, that the fifth section was enacted.

Both sections are necessary parts of one scheme, which becomes imperfect when either part is destroyed.

FIFTH. It is submitted that if, for any reason, the fourth section is inapplicable to this case, the fifth section, as part of the same scheme, is equally unavailable.

The fourth section of the act does not, in express terms, apply to acts done before the passing of the act, and it will not be construed as intended to be applied to such acts.

Statutes must be construed prospectively, unless there

are very express words giving them a retrospective application.

Johnson v. Van Zandt, 12 John., 169.
Hackley v. Sprague, 10 Wend., 113.
The People v. Supervisors, &c., Ib., 363.
2 Dwarris, 677.
Palmer v. Conly, 4 Denio, 374.
Affirmed 2 Comst., 182.
Johnson v. Burrell, 2 Hill, 238.
Berley v. Rampacher, 5 Duer, 183.
Calkins v. Calkins, 3 Barb., 305.
Sayer v. Wisner, 8 Wend., 661.

SIXTH. Another reason why a return to the writ of error will not be enforced is, that no case is shown on the face of the papers bringing this case within section 5 of of the act of 1863. It is only when a suit is brought for an arrest or imprisonment made by the order of the President that a writ of error is authorized; and there is nowhere any allegation in the writ of mandamus that the action in the State Court was brought for any such cause.

Proof of the existence of the fact is indispensable to give such a remedy.

Giving notice of such a defense among others, which the defendant may or may not seek to establish on the trial, and which in this case he did not pretend was true upon the trial, is not a case within either the terms or the spirit of the act of Congress.

Certainly it will not be said "a case had arisen" under the provision of the Constitution, unless the allegations in the mandamus bring this case within the very terms of the act of Congress.

SEVENTH. To allow this case to be removed and tried *ab initio* would be a great wrong to Patrie, because the

defendants did not attempt to remove the case before trial, but voluntarily left it to be tried in the State Court, by which Patrie has been subjected to very great expense, which it is not proposed to repay.

It would be an additional wrong if, on writ of error, the judgment in the State Court could be stayed without security. Such a doctrine is at variance with the practice of both the State and United States Courts, and is not authorized by the statute.

EIGHTH. It is also respectfully submitted that the United States Circuit Court had no power in this case to compel a return to the writ of error by mandamus.

NINTH. We claim that the judgment of the Circuit Court ought to be reversed, and the record be remitted to the court below, with directions to give judgment for the defendants in the mandamus with costs.

AMASA J. PARKER,
Of Counsel for Plaintiffs in Error.

IN THE

Circuit Court of the United States

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

Granted 1862

ROBERT MURRAY, *et al.*,
agst.
ALBERT W. PATRIE.

NELSON, C. J. This is a motion for a rule upon the Clerk of the Supreme Court of the Third Judicial District, held at Catskill, in the county of Greene, to make a return to the Circuit Court of the United States, for the Southern District of New York, on a writ of error to remove a judgment rendered in the said Supreme Court in favor of Patrie against Murray *et al.*

The suit in which the judgment was rendered was brought to recover damages for assault and false imprisonment, in which a verdict was rendered for $9,000.

The principal ground of defense set up, was that the arrest and imprisonment, which occurred between the 27th of August and 3d of September, 1862, took place under the order of the President of the United States.

The fourth section of the Habeas Corpus act, March 3d, 1863, provides that any order of the President, &c., made during the rebellion, shall be a defense in all Courts to any action, &c., pending, or to be commenced, for any arrest or

imprisonment made or committed under such order, or under color of any law of Congress.

The fifth section provides for the removal of any such suit commenced in a State Court to a Circuit Court of the United States, either before or after judgment. As respects the latter, the section declares "it shall also be competent for either "party, within six months after the rendition of a judgment "in any such cause by writ of error or other process, to "remove the same to the Circuit Court of the United States "of that district in which such judgment shall have been "rendered; and the said Circuit shall thereupon proceed to "try and determine the facts and the law in such action in "the same manner as if the same had been there originally "commenced, the judgment in such case notwithstanding."

This provision of the fifth section, and, indeed, the whole of it as to the removal of causes, is a literal copy of the sixth section of the act of March 3, 1815. (3 U. S. Statutes, p. 238.) The question of the removal of causes from the State to the Circuit Court of the United States was discussed very much in Martin v. Hunter's Lessee (1 Wh. R., pp. 346–350), and no doubt entertained but that it may take place after as well as before judgment.

It was again commented upon in the case of Osborn v. The Bank of the United States (9 Wh. R., pp. 821–828), and especially by Mr. Justice Johnson in his dissenting opinion (pp. 884–889). Mr. Justice Johnson was inclined to the conclusion that Congress would not confer original jurisdiction upon the Circuit Courts of the United States, either directly or by removal from State Courts, in cases "arising under the Constitution, the laws of the United States and treaties, &c., inasmuch as the Federal Court must assume the jurisdiction upon the simple hypothesis that such question had arisen, and that, until such question had actually arisen and was presented for decision, the case was exclusively cognizable in the State Court." This view led the learned Justice to maintain that the question could be brought properly

before the Federal Court only under the twenty-fifth section of the judiciary act, as it could not be ascertained whether the case had actually arisen till it was heard and decided. The Chief Justice, who delivered the opinion of the Court, held that jurisdiction could be entertained when the question assumed such a form that the judicial power was capable of acting on it: that it then became a case, and that the judicial power extended to all cases arising under the Constitution, &c.

We admit that the bringing of the suit in the Federal Court, and the averments in the declaration in conformity with the act of Congress conferring the jurisdiction, do not vest it necessarily or definitely in the Court. If it did, the argument of the learned counsel against this motion would be conclusive, namely, that the principle would draw within the Federal jurisdiction cases without limit at the election of the plaintiff. But the defendant may meet the question, whether or not it is a case arising under the Constitution, &c., by pleading or on the trial, as we have endeavored to show in Dennistown and Others v. Draper, and thus confine the jurisdiction within the constitutional limit. So in the case of original jurisdiction by removal from the State Court. (See MS. opinion in above case.)

An objection is taken to the removal in this case, on the ground of its violation of the seventh article of the Constitution, which is, that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Whether or not this amendment would deprive their want of jurisdiction, we are not inclined to determine on this motion. It is a question that may come up on the trial and to be then ruled by the Court, and which ruling can be reviewed on error by the Supreme Court.

The question, also, whether the fourth section of the act of Congress, of March 3, 1863, is constitutional, and if so, whether it applies to this case, are questions that belong to the trial, and need not now be examined.

It was suggested by the counsel for both parties, on the argument, that if the Court had any serious doubts upon the questions involved in the removal, that the decision be reserved and the cause heard before both the Judges, that the parties might have the benefit of a division of opinion, if such should be the result. Having come to the conclusion that the objections to the jurisdiction are properly available on the trial, the suggestion is unimportant. (See Dennistown and Others v. Draper.)

Let the rule be entered by the Clerk.

(Copy.) KENNETH G. WHITE,
Clerk.

9 Wheat 235
5 How 434
Dunn Duncan 2 Pet 127
1 How 528
11 How 172
14 How 58
2 Story on Eq 1390
Parsons v Bedford - 3 Pet 444
Chas Riv v Warren

Mr Justice Clifford

IN THE

SUPREME COURT

OF THE

UNITED STATES.

The Justices of the Supreme Court of the State of New York, for the Third Judicial District, &c., Plaintiffs in Error,

vs.

The United States, Ex rel., Robert Murray, et al., Defendants in Error.

Further Brief of Plaintiffs in Error, in reply, presented by consent of counsel for defendants in error.

I.

The "jurisdictional point" of the defendants in error is not well taken. We insist that this court has jurisdiction to re-examine, under the 22d section of the act of 1789, on writ of error, a judgment of the Circuit Court, ordering the issuing of a peremptory mandamus.

It was so expressly held in Insurance Company vs. Wheeiright, 7 Wheaton, 534; and, in that case, the only want of jurisdiction arose from the fact that the office in question was not proved to be worth the requisite sum to confer jurisdiction, no proof having been given of the amount of salary.

In this case, the amount in controversy is ample, the judgment sought to be reviewed being over $9,000.

The other two cases cited, viz: 5 How., 103 and 1 Black, 271, arise not on *mandamus* but on *habeas corpus*, and no amount of value was in controversy.

Besides, independent of the 22d section of the Judiciary act, it was clearly the intention of the act of 3 March, 1863, to confer jurisdiction by writ of error to this court, in every case arising under that act, and to do so without reference to the amount in controversy, the 6th section authorizing a writ of error in any suit or prosecution under that act, whatever might be the amount of the judgment.

This court evidently acted upon that view of the law in Mayor vs. Cooper, 6 Wallace, 247, where a writ of error was entertained, and an order of the circuit court reversed, by which this court had dismissed a suit removed from the state court under the act in question, and the act of 1866.

II.

If it is said the case last cited bears upon the merits involved in this writ of error, I beg leave to say, that the cases and questions are widely different.

1. That was a case of removal *before* trial, and did not conflict with the 7th amendment to the constitution of the United States.

2. The defense in that case was claimed to be as well under the act of March 11, 1866, as of the act of March 3, 1863.

3. That case was removed, not on a mere allegation or notice in an answer or plea, but on petitions duly verified, proving that the alleged trespasses were committed by authority of the president, &c., thus by

evidence uncontradicted, bringing the defense within the language of the 5th section of the act of 1863.

In this case, there is no proof whatever, by affidavit or otherwise, that the act was done by order of the president. The presumption is that it was not, as no such defense was pretended on the trial in the state court, and the 5th section of the act of 1863 gives the right of removal, not where such a fact is set up in a plea and afterwards abandoned, but only where a suit shall be, *in fact*, brought for an act done or arrest made by order of the president, &c.

4. It is true that the defense given by the 4th section of the act of 1863 is properly available in the U. S. Circuit Court, and the defendant can have the full benefit of it there.

Whether the constitutionality of that defense is not also properly available on the question of removal to the U. S. Circuit Court, seems only to have been argued *on one side*, in the case in 6 Wallace. No counsel appeared there to argue on behalf of the defendant in error. It virtually went by default.

5. But the principal ground on which we seek to reverse the judgment in this case, viz: that the act authorizing the removal and new trial after judgment is in conflict with the 7th amendment of the constitution, cannot be answered by saying that ground is available as a defense in the U. S. Circuit Court. *It is not a defense in the suit, but an objection to the removal and new trial.*

We cannot protect our constitutional right, which is infringed, except just at this stage of the proceeding.

Suppose the cause should be removed into the U. S. Circuit Court. There it would remain tied up forever, unless we notice it for trial. The defendant would not do so; he does not desire it to be tried. When

we notice it for trial, we admit the right of that court to try it, and waive all legal objections to its doing so. By the operation of such machinery our right to our verdict obtained and to the costs recovered would be taken away from us without redress.

We respectfully insist, that the law, as constitutionally administered in this country, cannot be made chargeable with such injustice.

AMASA J. PARKER,
Of Counsel for the Plaintiff in Error.

BRIEF OF THE UNITED STATES ON THE RE-ARGUMENT.

In the Supreme Court of the United States.

No. 12.

DECEMBER TERM, 1869.

THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE THIRD JUDICIAL DISTRICT AND FOR THE COUNTY OF GREENE, AND THE COUNTY CLERK OF SAID COUNTY,

vs.

THE UNITED STATES, EX RELATIONE ROBERT MURRAY & AND WILLIAM BUCKLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE JUSTICES OF THE SUPREME COURT of the State of New York for the third judicial district and for the county of Greene, and the county clerk of said county,

vs.

THE UNITED STATES, EX RELATIONE Robert Murray and William Buckley.

No. 12.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of the United States on the re-argument.

In addition to the brief already filed by the late Attorney General, in this case, and the argument of N. P. Chipman, esq., counsel for defendant in error, in Scarlett, administrator, *vs.* Fuller, No. 103, in the Supreme Court of the United States, December term, 1868, the Attorney General, pursuant to the order of this court directing a re-argument, submits the following brief:

STATEMENT.

This is a writ of error to review a judgment rendered in the circuit court of the United States for the southern district of New York, awarding a peremptory mandamus to be directed to the plaintiffs in error, commanding them to remove and transfer into the said circuit court a certain judgment and the record thereof, which judgment was rendered June 8, 1864, at a special term of

the supreme court of the State of New York, held in the county of Greene, in a suit then and there pending in favor of Albert U. Patrie, plaintiff, *vs.* Robert Murray and William Buckley, defendants, for the sum of $9,343 34, damages and costs, and ordering said supreme court of the State of New York to proceed no further in said suit. The defendants in said suit were the United States marshal for the said southern district, and his deputy, who were jointly sued for an alleged arrest and false imprisonment of the plaintiff, made in August, 1862, and pleaded in defense, among other things, that the arrest was made by them in their official capacity, by virtue and under color of authority derived from the President of the United States. After judgment in the State court they applied to the said circuit court of the United States for process under the provisions of the fifth section of the act of March 3, 1863 (12 Stat., 755), to remove the suit from the said supreme court of the State of New York to the said circuit court of the United States, and a writ of error and citation to the former court were accordingly allowed by the latter, and served; but, no return having been made to this writ of error, an alternative writ of mandamus was obtained from said circuit court, to which the said justices of the supreme court and the county clerk made answer; to which answer the United States and the said relators demurred, and the said justices and clerk joined in the demurrer; whereupon, on consideration of the premises, and after mature deliberation had, the said circuit court sustained the demurrer, and ordered that a writ of peremptory mandamus issue; thereupon this writ of error from the Supreme Court of the United States was sued out, to review the said judgment of said circuit court.

Some of the statutes of the United States that have been passed authorizing a removal of suits from State courts to courts of the United States are the following:

Sections 12 and 25 of the act of September 24, 1799 (1 Stat., 79, 85); sec. 8 of the act of February 4, 1815 (3 Stat., 198); sec. 6 of the act of March 3, 1815 (3 Stat., 233); sec. 2 of the act of March 3, 1817 (3 Stat., 396); sec's

3 and 4 of the act of March 3, 1833 (4 Stat., 633); sec. 5 of the act of March 3, 1863 (12 Stat., 756); sec. 67 of the act of July 13, 1866 (14 Stat., 171); the act of July 27, 1866 (14 Stat., 306); the act of March 2, 1867 (14 Stat., 558); the act of January 22, 1869 (15 Stat., 267); sec. 2 of the act of July 27, 1868 (15 Stat., 227). 14 Stat. 46, 385.

The defense set up in the State court arose under the 4th section of the act of March 3, 1863, and the writ of error from the circuit court of the United States to the State court was sued out pursuant to the 5th section of the same act. The attention of the court is called to these words in that section: "And it shall also be competent for either party, within six months after the rendition of the judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered, and the said circuit court shall thereupon proceed to try and determine the facts and law in such action in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding."

CERTIORARI.

It does not appear in the transcript of the record when the writ of error from the circuit court was sued out, and the proceedings on the application for this writ of error are not made a part of the record. The only statement in the record is in the recitals of the alternative writ of mandamus on page 3, of the printed transcript, to the effect that a writ of error, after the entry of the said judgment was duly allowed by the said circuit court, and citation thereon was also allowed, and proper bond given thereon for the removal, which said writ of error, citation, and bond were duly filed and served, and that after the rendition of the said judgment a motion was made on behalf of said Murray and Buckley, before the justices of the supreme court of the State, to allow the said action to be removed and transferred into the said circuit court of

the United States, and for a stay of proceedings, and that said motion was denied, and that said justices have proceeded further in the case, and have permitted execution to be issued on said judgment.

We are informed that this writ of error from the circuit court to the said supreme court was sued out on the 29th of June, 1864, the judgment in the State court having been entered on the 8th of June, 1864, and thus it was sued out within six months after the rendition of judgment.

We desire to call the attention of the court to what seems to be a defect in the record, and to suggest whether a writ of certiorari should not issue to bring up the full record.

In proceeding with the argument we assume that this writ of error was seasonably sued out, and that the proceedings in applying for and serving it were according to law.

First. The Constitution of the United States ordains that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may from time to time establish," and that this power "shall extend to all cases in law and equity arising under the Constitution and laws of the United States," &c.

The original jurisdiction of the Supreme Court is prescribed by the Constitution. In all other cases mentioned by the Constitution, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

In regard to the inferior courts of the United States, two things are necessary to confer jurisdiction over a case: First, it must be a case to which the judicial power of the United States extends; and, second, an act of Congress must grant to a court of the United States jurisdiction over it. The appellate power of inferior courts may extend to all cases arising under the Constitution and laws of the United States, whether such a case first arises in a State court or in a United States court; and the manner in which jurisdiction shall be

acquired by these inferior courts, whether it shall be original or appellate, or original in part or appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed by the Constitution, but are left for Congress to determine.

The Mayor *vs.* Cooper, 6 Wall., 247.

The constitutionality of the 25th section of the judiciary act of 1789, whereby a final judgment of a State court, in certain cases, may be examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, has not been doubted since the decision in Martin *vs.* Hunter's lessee, 1 Wheaton, p. 304. It is established, then, that the appellate jurisdiction of the courts of the United States, in a proper case, may be exercised over a suit originally brought in a State court, after judgment in such State court. But, by the 25th section of the judiciary act, only certain questions of law are authorized to be re-examined in the Supreme Court of the United States.

The constitutionality of the act of March 3, 1863, so far as it provides for the removal of certain suits from the State courts to the courts of the United States, before a verdict and judgment thereon in the State courts, may be regarded as settled. (The Mayor *vs.* Cooper, 6 Wall., 247.) The plaintiffs in the suit at bar deny the constitutionality of that act, so far as it provides for a writ of error to a State court, after judgment on a verdict in the State court, for the removal of the cause to the circuit court of the United States, so that the circuit court may try and determine the facts as well as the law. And they also deny the right of the ~~district~~ circuit court of the United States to issue to a State court a peremptory writ of mandamus commanding such a removal of the suit.

The cases in which the constitutionality of this act of March 3, 1863, in respect to a removal of a suit, has been sustained, are—

The Mayor *vs.* Cooper, 6 Wall., 247.
Hodgson *vs.* Millward, 3 Grant's Cases, 412.
Kulp *vs.* Rickett, *ibid.*, 420.
Todd *vs.* Fairfield, C. P., 15 Ohio St. R., 357.

McCormick *vs.* Humphreys, 15 Am. Law Reg., 552.
Jones *vs.* Seward, 17 Abbott Pr. R., 377.

The cases relied on as deciding against the constitutionality of the act, so far as it authorizes the removal of a suit, after judgment, are—

Weatherby *vs.* Johnson, 14 Mass., 412.
Patrie *vs.* Murray (the case at bar), 43 Barbour, 331.
Same case, 29 How., Pr. R., 312.
Ohio *vs.* Bliss, 3 Grant's Cases, 427.

If the case at bar is a case within the judicial power of the United States, it is a case which the courts of the United States can, by Congress, be empowered to take jurisdiction of; and it is for Congress alone to determine whether the jurisdiction shall be original or appellate; and, if appellate, whether it shall belong in the first instance to one of the inferior courts of the United States, or to the Supreme Court And, unless restrained by the Constitution of the United States, Congress can make this appellate jurisdiction a jurisdiction over facts, as well as law. The number of inferior courts to be established, and the extent of their jurisdiction within the limits of the Constitution, it is exclusively for Congress to determine.

The plaintiffs' cause of action in this suit was at common law. The defendants justified under the 4th section of the act of March 3, 1863, and when the plea was filed, a case then arose under a law of the United States and within the judicial power of the United States to determine; and it is undeniable that Congress by the act attempted to give the defendants a right to remove this suit to the circuit court of the United States, both before and after judgment, in such form that a trial, according to the course of the common law by a jury, might be had in the circuit court. The sole restriction of the Constitution relied on as prohibiting such a trial of facts, as well as of the law, in the circuit court of the United States, is Article VII of the amendments to the Constitution. It seems settled that the amendments to

the Constitution are not restrictions on the rights of the States.

Barron *vs.* the mayor, 7 Peters, 243.
Livingstone's lessee *vs.* Moore, 7 Peters, 551.
Fox *vs.* Ohio, 5 How., 434.
Smith *vs.* Maryland, 18 Howard, 71.
Withers *vs.* Buckley *et al.*, 20 Howard, 90.
Pervear *vs.* Commonwealth, 5 Wall., 479.
Twitchell *vs.* Commonwealth, 7 Wall., 321.

Many of the States have allowed more than one trial of a suit by a jury in their own courts as a matter of right. (For the former practice in Massachusetts, see U. S. *vs* 1,363 bags of merchandise, 2 Sprague, 85.) It is admitted that this amendment prevents the re-examination in a court of the United States of any fact previously tried by a jury in a court of the United States except a new trial be granted by the court before which the suit is pending, or except the judgment of the court be reversed by a superior tribunal on a writ of error, and a *venire facias de novo* be awarded. (U. S. *vs* Wonson, jr., 1 Gall., 4)

Does this amendment prevent the examination by a jury in a court of the United States of a fact in a case within the judicial power of the United States, which has been previously tried by a jury in a State court? It is plain that the first clause of the article, to wit, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," relates only to the courts of the United States. The only express mention of the appellate jurisdiction of the courts of the United States is in section 2, article III, to wit, "in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make." In some of the States at the time of the formation of the Constitution, the word *appeal* was used to express the removal of a suit at common law after judgment, to a superior tribunal in such a manner that both the facts and the law were re-examined by the superior court. (See U. S. *vs* Wonson, 1 Gall., 13–16.)

The seventh amendment secured two things in regard to which the States were jealous: First, a jury trial in a court of the United States in all suits at common law, when the value in controversy exceeded twenty dollars, and second, that on any review of this case the facts found by a jury should never be re-examined by a court without a jury, or in any other manner than facts were re-examined according to the practice of the common law courts in England, whereby a trial of facts was confined to a jury of the vicinage or a jury of the place where the case was originally tried. This amendment secured parties in courts of the United States from a determination of facts in suits at common law by a court without a jury or by a court and jury sitting and summoned many hundred miles from the place where the cause of action arose or the court in which it was originally brought and tried.

The last clause of the seventh amendment must be connected with the first clause, and means that no fact tried by a jury in such a manner as is prescribed by the first clause, shall be otherwise re-examined in any court of the United States than according to the rules of the common law. This article was not intended to prevent one full trial, both of law and facts, in any case arising under the laws of the United States in a court of the United States. Mr. Justice Swayne in the opinion in the case of the Mayor *vs.* Cooper, 6 Wall., 253, says: "It is the right and the duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals," and further (on same page), "for every act of an officer, civil or military, including alike the highest and lowest, done under their authority, he would be liable to harassing litigation in the State courts, however regular his conduct. Neither the Constitution nor laws of the United States could avail him, if the views of those tribunals, and of the juries that sit in them, should be adverse."

Congress may hereafter enact that the qualifications of jurors shall be very different from those required by the laws of a State; as Congress has enacted that sixteen grand jurors, and not twelve, shall be necessary for

a quorum. (See U. S. *vs.* Enoch Reed, 2 Blatchford's C. C. R., 435.) The jury of a State court might not be such, either in the number of the panel or the qualifications of the jurors, or the laws of the State not such in requiring a unanimous verdict, as the Constitution and laws of the United States require. Is there any doubt that the seventh amendment would not prevent the removal of a case at common law, arising under the Constitution and laws of the United States, to a United States court from a State court, and a re-examination of the facts in the United States court by a jury such as the laws of the United States require, if those facts had been previously examined only in a State court by a State jury, not such as the Constitution and laws of the United States require? May not Congress pass a law securing to every citizen, whether plaintiff or defendant, in a suit arising under the laws of the United States a trial in a court of the United States, by such a jury as the Constitution and laws of the United States prescribe, even after judgment in a State court?

(See Nos. 80–83, both inclusive, of the Federalist.)

Second. The constitutionality of the fourth section of the act of March 3, 1863, and the validity of the defense set up under it, do not seem to arise in a review of the judgment awarding a mandamus. (Mayor *vs.* Cooper, *ubi supra.*) The question of the right of removal and of the jurisdiction of the circuit court, based upon the alleged absence of right in the defendant to remove the suit, must be raised at the trial in the circuit court of the United States, and be determined there.

Dennistown *et al. vs.* Draper, 5 Blatchford's C. C. R., 336.

The right of removal is one of strict law, and not of discretion.

(Garden *vs.* Longeast, 16 Peters, 97.)

Third. Had the ~~Supreme~~ Circuit Court of the United States the right to compel by mandamus the State court to make a return to the writ of error, and to permit a removal of the case? (See the People *vs.* the Judges, 2.

Denio, 197; Spruggins *vs.* County Court; 1 Cooke, 160; Brown *vs.* Crippin, 4 Hen. & Mumford, 173; Hopper *vs.* Kalkman, 17 Cal., 517.) The care which this court has taken to prevent any conflict between the courts of the United States and their officers and the courts of the States and their officers, is well known. (In regard to the service of process and the jurisdiction over property, see Taylor *vs.* Carroll, 20 How., 583; Freeman *vs.* Howe *et al.*, 24 How., 450; in regard to jurisdiction over persons, Ableman *vs.* Booth, 21 How., 506; in regard to compelling a State to perform its duty, Kentucky *vs.* Ohio, 24 How, 66.)

A State court cannot issue a mandamus to an officer of the United States (McClung *vs.* Silliman, 6 Wheat., 598), but the converse is not true. The circuit courts of the United States may issue writs of mandamus to municipal corporations and county officers whenever such writs are necessary to the exercise of the jurisdiction of these courts, under the 14th section of the judiciary act of 1789.

Riggs *vs.* Johnson, 6 Wall., 166.
King *vs.* Aspinwall, 24 How., 376.
City of Galena *vs.* Amy, 5 Wall., 705.

A mandamus in this case is necessary to the exercise of the jurisdiction of the circuit court, and the circuit court must determine whether the case at bar is a case which it is authorized to remove and try under the 5th section of the act of 1863. In matters of appeal an appellate court must determine its own jurisdiction. Making a return to the writ of error from the circuit court by the State court is a merely ministerial duty, and such as the defendants, if they have a right to remove the case, must have a right through the circuit court to have performed. The Supreme Court of the United States issues writs of mandamus to the inferior courts of the United States to compel the performance of similar acts.

Life and Fire Insurance Co. *vs.* Wilson, 8 Peters, 291.
Ex parte Crane, 5 Peters, 190.
United States *vs.* Gomez, 3 Wall., 752.

Ex parte Bradstreet, 4 Pet., 102.

Stafford *vs.* Union Bank of La., 17 How., 275.

Ex parte Dubuque & Pacific Railroad Company, 1 Wall., 69.

Ex parte Milwaukee Railroad Company, 5 Wall., 825.

In Martin vs. Hunter's lessee, 1 Wheat., 304, 362, the court gives no opinion whether it has authority to issue a writ of mandamus to the court of appeals of Virginia, as it is not necessary to the decision. This case arose under the 25th section of the judiciary act of 1789, which provides that if the case shall have been once remanded before, the Supreme Court may proceed to a final decision of the same, and award execution. If the courts of the United States cannot compel a return to a writ of error, for the removal of a suit in cases which they are authorized to remove and try, then their jurisdiction in such cases is nugatory. It cannot be denied that if any process can issue to compel a removal by a writ of error, the writ of mandamus is the proper process.

E. R. HOAR,
Attorney General.
W. A. FIELD,
Assistant Attorney General.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOR THE THIRD JUDICIAL DISTRICT, &c., &c., *Plaintiffs in Error*,

agt.

THE UNITED STATES *ex rel.* ROBERT MURRAY, *et al.*, *Defendants in Error.*

Brief of Counsel for Plantiffs in Error on Reargument.

The reargument of this case is directed on the two following points:

1. Whether or not an act of Congress providing for the removal after judgment, by a State court, of the cause in which the judgment was rendered, for new trial, is an act in pursuance of the Constitution of the United States.

2. Whether or not the provision in the seventh amendment of the Constitution of the United States, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law, applies to facts tried by a jury in a State court.

POINTS.

FIRST. We contend that that portion of the fifth section of the act of March 3, 1863, which authorizes the removal of a cause, after verdict and judgment, for new trial, into the Circuit Court of the United States, is unconstitutional and void. 12 Stat 756

It is not *appellate* jurisdiction that is attempted to be conferred by the fifth section, for no review of any decision made in the State court is to take place; but it is attempted to give to the United States Circuit Court by the transfer, *original* jurisdiction, to try the cause *de novo*.

The only clause of the Constitution conferring judicial power on the Federal Courts, is in article three, section two; and if the powers claimed exist at all, it is because this is "a case arising under the laws of the United States."

I concede the rule to be, as stated by Mr. Justice Swayne, in The Mayor v. Cooper, 6 Wallace, 252, 253, and that a case may arise when the validity or proper construction of a law of the Unitnd States is in question.

It follows, of course, that the provisions of the fourth section of the act of Congress in question, which declares the order of the President, or under his authority, a defense to an action, are the proper subject for a case that shall give the United States court jurisdiction, and will give such jurisdiction whenever a case shall arise calling for a decision as to the constitutionality of that section.

But here we must stop concession. It is not enough that a case may arise. It must actually arise, to confer the jurisdiction, and this court has declared when such case actually arises.

"A case arises, within the meaning of the Constitution, whenever any question respecting the Constitution,

laws and treaties of the United States has assumed such a form that the judicial power is capable of acting upon it."

Osborn v. U. S. Bank, 9 Wheaton, 819.

And "that power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

Curtis' Commentaries, § 7.

Here no case had arisen. The defendant, in the original suit had, among other defences, answered that he would set up a defense, under the fourth section of the act, and in doing so, had submitted it to the State court. No one will deny but the State court had jurisdiction of the suit and of the defense, if it had been attempted to be set up on the trial.

If it be said a "case arose" by pleading such defense, which may well be questioned, it ceased to arise and ceased to exist when, on the trial in the State court, such defense was abandoned, and the cause was tried and decided on other grounds

Before the attempt was made to remove the cause into the United States Circuit Court, the defendant in the original suit, instead of availing himself of his right to remove the cause before trial, as it is decided by this court he might have done (Mayor *v.* Cooper, 6 Wallace), had neglected to do so, and had voluntarily remained in and gone before the State court for trial. He had there noticed the cause on his part, for trial in the State court, abandoned this defense and tried the cause on its merits. He had raised no question under the law of Congress, and had taken no exception. He had suffered judgment to be entered against him on the verdict. Could any abandonment be more marked and complete?

If a case had arisen on the putting in of a plea in the

State court, had not that case been judicially terminated by the action of a court of competent jurisdiction?

If the act of Congress had given an appellate jurisdiction to the United States Circuit Court to review the decision of the State court on the question as to the validity of such fourth section, and that question had been actually raised and determined in the State court, as the twenty-fifth section of the judiciary act has given to this court jurisdiction to review in such a case the decision of the highest State court, then indeed a new case would have arisen on the exception taken to the decision of this State court, which there would have been jurisdiction in the United States Circuit Court to review.

But the writ of error which, it seems to me, is very inappropriately named, was brought by the defendant in the State court to remove the judgment of the State court into the United States Circuit Court, not for the purpose of reviewing any alleged error, but for the sole purpose of resuscitating a tried and dead issue of fact, and of taking jurisdiction of a case in which no living question involving any decision under a law of Congress, or any other law, then remained.

It will not help the argument of our opponents at all, to say, the fifth section authorizing the removal, presented itself a question under a law of Congress. Whether a case arises or not, is to be judged of not by the act authorizing the removal, but only with reference to the act of Congress to be interpreted. If any aid could be obtained from the act authorizing the removal, then Congress has only to say that every case tried in a State court, no matter what the questions involved, no matter whether litigated or by default, no matter whether, as in this case, no question whatever was raised on the trial with reference to the Constitution, or a treaty, or a law of Congress, may be removed by any

defendant, at pleasure and at any time, into a federal court and tried *de novo*, and thus jurisdiction would be given to the federal courts over all the litigation of all the States.

It is plain that the jurisdictional right of removal must be ascertained by reference only to the Constitution and the acts of Congress to be interpreted and the facts as they were presented, independent entirely of any aid from the act authorizing the removal, and that the fifth section of the act in question is to be treated as if it were a separate and subsequently passed act.

This view is entirely consistent with what is said in Osborne v. The Bank of the United States, 9 Wheaton, 738. In that case the suit was brought in the United States Court, by virtue of an act of Congress, and the same act created the bank and authorized it to sue in the United States courts. A case therefore arose, under an act of Congress, when the suit was commenced, for the question of the validity of that act of Congress and of the constitutionality of the bank itself, was necessarily involved at every step of the suit. The suit could neither have been commenced or carried on without an assertion of the legal existence of the Bank.

This court decided, in The Mayor v. Cooper, that a cause may be removed from a State court to the United States Circuit Court, under the 5th section of the act of 1863, before trial, but that case was removed, not on a mere allegation or notice in an answer or plea, but on petitions duly verified, proving that the alleged trespasses were committed by the authority of the President, &c., thus by evidence uncontradicted, bringing the defense within the language of the section authorizing the removal. In that way evidence was given to the court that a case had arisen and was presented for trial under a law of Congress. In this case, there is no proof whatever before this court, by affidavit or otherwise,

that the act in question was done by order of the President, or that the defendants intend to avail themselves of such a defense: nor was there any such proof before the United States Circuit Court. Even on application to remove before trial, this case would stand before the court destitute of the proofs requisite to remove it. But the question here is not whether it could have been removed before trial, but whether it can be removed after trial and judgment, not for review but for new trial, when every allegation of the plea relating to the fourth section has been abandoned, when the merits have been fully and fairly tried in the presence and by concurrence of both parties, and before a court of competent jurisdiction.

The construction contended for by our opponents in this case would bring with it the greatest evils in the administration of justice.

A plaintiff honestly seeks relief in the State court for a great personal injury. The defendant, among other allegations of defense, sets up in his plea that he did the act complained of by order of the President. This he may do in a case where there is not the slightest foundation for such a pretense. He goes to trial in the State court, and as there is, in fact, no such defense existing, the cause is tried on its merits, and a large verdict justly recovered by the plaintiff, without any exception being taken, and without any claim of error. If the defendant has a right then to remove the cause into the United States Circuit Court, and there have the cause retried by a jury, without even the payment of the plaintiff's costs incurred on the first trial, he deprives the plaintiff of his verdict, and subjects him to great expense. On the second trial he makes a show of attempting to prove that the act causing his personal injury was done by order of the President, but fails in establishing it. and the defendant has accomplished, by the removal,

all he desired and hoped for. He has secured a second trial in a different tribunal, with the chance of getting off with a less verdict against him.

If this can be done, the United States Circuit Courts may be crowded with suits in which no case arising under a law of the United States actually exists, and in which the party removing the suit knew perfectly well that no such case would or could arise on the trial.

This court has never yet decided that a cause may under any circumstances, be removed after judgment, for a new trial into the United States Circuit Court, and we claim to have shown that no such power exists under the Constitution.

But if such power exists, we claim that the particular circumstances of this case are not such as to bring it within the legitimate exercise of such power.

There is another, and we think unanswerable reason, why Patrie cannot be deprived of his judgment, recovered in the State court, by the simple removal into the United States Circuit Court. The judgment was entered and docketed against the defendants on the 8th day of June, 1864, for $9,343.34. (Folios 4 and 16.) That judgment was property, more so than a promissory note or bond would be, for the docket made it a lien on the real property of Murray & Buckley.

Now, if that judgment can be *vacated* by a removal to the United States Circuit Court, Patrie is thereby "deprived" of his "property" without due process of law, and in palpable violation of the fifth amendment to the Constitution of the United States.

No such objection exists to a removal before trial, for there is, then, no recovery, and of course no property; and no such objection exists to a removal of a judgment for *review*, for that is done by due process of law.

Due process of law generally implies and includes *actor*, *reus*, *judex*, and must always be according to the

usages and modes of proceeding existing in the common and statute laws of England, at the time of the emigration of our ancestors.

Murray v. Hoboken Co., 18 How. R. 272, 276, 280.
Sedgwick on Const. Law, 610, 612.
Taylor v. Porter, 4 Hill N. Y. R., 140.
Claim of Reside, 9 Op. of Att'y-Gen'l, 200.

SECOND. On the second point submitted for reargument, we claim that the provision of the seventh amendment of the Constitution of the United States, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, applies to facts tried by a jury in a State court.

It has been held that the latter clause of the seventh amendment has no connection with the first clause, which secures a trial by jury, but "it is to be read as a "substantive and independent clause" (Curtis on the Constitution, page 114, and cases there cited); and the same authorities declare that "it is a prohibition to "the courts of the United States to re-examine any "facts tried by a jury, in any other manner than in the "modes known to the common law."

In Parsons v. Bedford, 3 Peters, 447, 448, this court said: "This is a prohibition to the courts of the United "States to re-examine any facts tried by a jury in any "other manner. The only modes known to the common "law to re-examine such facts, are the granting of a new "trial by the court where the issue was tried, or to "which the record was properly returnable; or the "award of a *venire facias de novo*, by an appellate court "for some error in law which intervened in the proceed-"ings."

In the United States v. Wonson, 1 Gallison, 19, 20, Judge STORY states the history of the seventh amendment and the reasons which led to its adoption, and shows that its object was to restrict the appellate jurisdiction which had been conferred on the federal courts. An apprehension was felt that the appellate jurisdiction which had been given to the Supreme Court, both as to law and fact, might be construed to allow it to grant new trials otherwise than according to the rules of the common law.

That appellate jurisdiction included all cases removed from the State courts to the United States Supreme Court for review, and it is only under that clause that such removals are made.

Martin v. Hunter, 1 Wheaton, 304.

In Barron v. City of Baltimore, 7 Peters, 243 (quoted with approbation in Twitchell v. The Commonwealth, 7 Wallace, 326), Ch. J. Marshall said: "They (the amendments) are limitations of power granted in the instrument itself."

It was to restrict and limit that portion of the Constitution which gives jurisdiction to federal courts, under which all cases are now removed to the federal courts from the State courts, that the latter clause of the seventh amendment was adopted. Its object was to prevent just such legislation as that of which we complain.

The precise question here presented was decided by the Supreme Court of Massachusetts, in Weatherbee v. Johnson, 14 Mass., 412; and the question is fully discussed by the Supreme Court of New York, in Patrie v. Murray, 43 Barb. 331, S. C., 29 Howard Pr. Rep., 312, when this case was before that court, in which the court followed the decision made in Massachusetts.

Ch. J. Parker, in 14 Mass. R., 420, gives the reason,

then fresh in the memory, which led to the adoption of this amendment, viz.: That after a trial by a jury in a State court in the vicinage, the fact should not be re-tried in a federal court which might take place at an inconvenient distance, and that all appellate jurisdiction which before had extended to both law and fact, now should be restricted to questions of law.

What is said by Ch. J. Parker is fully sustained by reference to the speech of Mr. Madison on the subject, reported in vol. 1, Debates in Congress, by Gales, old series, page 458. See also the latter part of No. LXXXI of "The Federalist," where Mr. Hamilton states the objections made to the Constitution as it then stood, and discusses the proposed change. The only question was whether the federal courts should have power to review questions of facts by a new trial, on appellate jurisdiction from State courts.

The following is a history of the amendment:

The 2d clause of the 2d section of art. 3, reads as follows: "In all cases affecting ambassadors, &c., &c., &c., the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

To this, it was proposed by the committee, of which Mr. Madison was chairman, to add:

"But no appeal to such court shall be allowed when the value in controversy shall not amount to —— dollars. Nor shall any fact triable by jury according to the course of the common law be otherwise re-examinable than may consist with the principles of the common law.

Debates in Congress, by Gales, old series.
Vol. 1, 1789-90, page 452.

It will thus be seen that the amendment was proposed for the purpose of restricting the appellate jurisdiction

of the Supreme Court of the United States over the State courts, and that the trial by jury referred to was a trial in a State court.

The amendment was again discussed, as reported on page 784 of the volume cited, purely with reference to the appellate jurisdiction from State courts, and the last clause was amended so as to read, "be otherwise re-examinable, than according to the rules of the common law."

The only important change subsequently made was to extend the prohibition to "any court of the United States," and so it was finally adopted.

The case in 14 Mass. has never been questioned.

In Davidson v. Burr, 2 Cranch. Cir. C. R., 515, and in Maddox v. Stewart, Ibid., 523, it was held that after a trial by jury before a justice of the peace, there could be no review of the questions of fact in the Circuit Court of the United States, because of the seventh amendment of the Constitution.

See also Curtis' Commentaries on the Const., sec. 17, and note.

Our opponents say these amendments are only applicable to the federal courts. Concede it It is only to the federal courts that we ask to apply them.

It is the federal court alone which is forbidden to grant a new trial on a question of fact, except according to the rules of the common law. There is nothing in the Constitution to restrain a State court from doing so. With that power we have nothing to do. It is said that in some of the States one new trial is allowed as a matter of course. That depends of course upon the State constitutions and State laws.

But whatever may be the policy as to the State courts, it is enough to know that such a power is absolutely forbidden to the federal courts and to Congress.

In the granting of power by the people to the federal

government, by means of the Constitution, all powers not granted nor prohibited by it to the States, were reserved to the States and to the people.

It would be enough to see that no such power as that claimed in this case was conferred by the Constitution; but it is placed beyond question by an express prohibition.

The prohibition is broad and comprehensive. It makes no exceptions of a case first tried in a State court. No matter where it is tried in the first instance. "*No* fact tried by a jury shall be otherwise examined "*in any court of the United States* than according to the "rules of the common law." How can the court make an exception which the framers of the Constitution did not make?

To interpolate such an exception, would defeat the principal, if not the whole object of the amendment. Its history shows, all the discussions show, that it was with reference to the control of the federal courts over the State courts, that the amendment was adopted.

There was never any danger apprehended of any abuse with reference to a verdict first obtained in a federal court. But it was a jealousy of federal power over the State tribunals, which created much of the opposition to the Constitution, and which could only be satisfied by the adoption of the amendments of 1789.

In Fox v. The State of Ohio, 5 How. R, 434, this court said: "These amendments to the Constitution are "exclusively restrictions upon federal power, intended "*to prevent interference with the rights of the States and* "*of their citizens.*"

The language of this prohibition is plain and unambiguous. It is explicit and calls for no interpretation. The application of it which we claim is in accordance with its history, and with the supposed necessity which called it into existence

To make now the exception demanded, and to enforce this prohibition only in the case of a verdict first obtained in a court of the United States, and to refuse to enforce it when the first verdict was obtained in a State court, would make an odious discrimination, even more offensive to the people, if not more insulting to the State courts than was ever apprehended by our fathers when they demanded and obtained the amendment.

The Circuit Court of the United States did not pass upon this question. It said it was not inclined to determine the question on motion, and that it might come up on the trial and be then ruled upon, and that the ruling could be reviewed on error by the Supreme Court.

But the question was necessarily and directly involved. The seventh amendment was a bar, *in limine*, to granting a new trial in that form. It is by the act of removal that a new trial is granted. The verdict recovered in the State court vanishes the moment the cause passes the threshold of the United States Circuit Court, and after that, there is nothing to be done except to try the issues *de novo*.

It may well be doubted whether any such question could be raised on the second trial in the United States Circuit Court. It is not the power *to try*, which is forbidden: but the power *to grant* the new trial. On the trial, the court might perhaps say to us: "You are too late with your objection, and cannot raise it now."

But conceding for a moment, that such a question could be raised on the second trial, by whom must it be raised? It would not, of course, be raised by the defendant in the suit removed. He has procured the granting of the new trial. He desires to proceed no further. And the plaintiff in the suit, who alone seeks redress by the suit, and is, therefore, the only moving party, must notice the case for trial, and thus waive all objection to the previous removal.

If he had not already waived his objection by noticing for trial in the United States Circuit Court, he would be placed in a very embarrassing position to be obliged to move on a case for trial, and at the same time to tell the court it had no right to try it.

We submit there can be no doubt that the time, if not the only time to raise the question, is in opposing the order which directs the removal.

It is therefore respectfully submitted that the seventh amendment is a full and complete answer to the application to remove the cause; and the plaintiffs in error ask that the judgment on the mandamus be reversed, and that the record be remitted to the court below, with directions to give judgment for the defendants in the mandamus, with costs.

AMASA J. PARKER,
Of Counsel for Plaintiffs in Error.